University of Alberta

Direct Democracy: What Legislative Role Can and Should National Direct Votes Play in Canada?

by

Barbara A. Billingsley ©

A thesis submitted to the Faculty of Graduate Studies and Research

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DEDICATION

To Douglas James

who was literally with me for much of
this research and writing process

and

To Johnson

for his valued and enduring support of my life goals

ABSTRACT

This thesis is an examination of the legislative role which national direct voting can and should play in Canada. Inspired by Canada's relatively recent experience with the 1992 national direct vote on the Charlottetown Accord, this thesis asks why such votes are not used more frequently in this country to resolve controversial issues of national policy and what constitutional and legal parameters govern the use of such votes. In order to resolve these questions, this paper first briefly reviews the national direct voting experience of other western democracies. Second, this paper reviews in detail Canada's national direct voting experience to date, including past proposals for national referendums and plebiscites and court decisions on legislation enabling such votes to take place. Third, by analyzing the arguments for and against direct voting, this paper considers whether national direct votes should be more readily available in Canada. Finally, this paper examines the constitutional and legal limitations which might govern the use of national direct voting in Canada in the future. The conclusion reached is that national direct voting can and should be used more frequently as a valuable legislative tool in conjunction with Canada's representative government system.

PREFACE

Like many other Canadians, in the early fall of 1992 I spent some time preparing to vote on the package of constitutional reforms known as the Charlottetown Accord. As I went through the exercise of reading the Accord, evaluating the arguments for and against, and finally casting my ballot, I found myself filled with a sense of pride and accomplishment for playing a small but important role in deciding Canada's immediate constitutional future. I felt privileged to have this extraordinary opportunity to directly effect national policy. For once, my vote and the votes of my fellow Canadians did not just help to decide *who* would govern this country (a decision which often seems to make little practical difference in Canadian politics) but rather helped to determine how the country would be governed and what rules would govern Canadians. This sense of importance in having the chance to vote on the Charlottetown Accord became even more overwhelming when it became apparent that the votes of the Canadian people had defeated the amendment package which had been so laboriously negotiated by our elected representatives. Although I recognized that Canadians rejected the Accord for a number of divergent personal and political reasons, for me, the popular defeat of the Charlottetown Accord still dramatically illustrated the power of democracy and the necessity for elected representatives to be in touch with the will of the people.

As I thought more about my feelings about the Charlottetown vote, however, I realized that my sense of privilege in having the opportunity to directly effect government policy seemed somewhat inappropriate in a democratic country like Canada. After all, if democracy is supposed to consist of government by the people, then shouldn't I expect to participate in deciding at least the most fundamental issues affecting this democratic nation? And shouldn't I expect the Canadian people to have the power to change, redirect or reject government policy without always having to replace the government members to do so? Naturally, these issues raised a number of other questions in my mind regarding the ability of Canadians to vote directly on government policy:

- Why and by what authority were Canadians given the opportunity to vote directly on the Charlottetown Accord?

- Why aren't Canadians asked more frequently to vote directly on controversial national legislative or constitutional proposals?

- Do Canadians have an inherent legal or constitutional right to vote on national legislative policies or on constitutional amendment proposals?

- Would the vote on the Charlottetown Accord open the door for future direct voting on matters of national policy?

- What legal guidelines govern the use of national direct voting in Canada?

- What can be done to make the direct voting process more available to Canadians on a national level?

- Are there any compelling reasons why direct voting should not be used more frequently as a means of obtaining public input on important issues of national policy?

This thesis is my attempt to resolve at least some of these questions for myself. Over the course of preparing this paper, I have become convinced that Canada's future will involve much more discussion of direct voting as a national lawmaking tool. I hope that the following pages can contribute to this discourse.

ACKNOWLEDGEMENT

I would like to acknowledge and thank Bruce Elman for his support, guidance and assistance in the research, writing and revising of this thesis and especially for his clarity and focus when I could feel this paper going awry.

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CHAPTER ONE

INTRODUCTION

By most recent accounts, Canadians are remarkably unsatisfied with our current political system.[1] The main problem seems to be that Canadians feel that they lack real power

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[1] One of the most comprehensive studies to make this observation in recent years was the *Report to the People and the Government of Canada*, by the Citizen's Forum on Canada's Future, 1991. After conducting a number of public hearings, the Forum made the following conclusions:

> One of the strongest messages the Forum received from participants was that they have lost their faith in both the political process and their political leaders. They do not feel that their governments, especially at the federal level, reflect the will of the people, and they do not feel that citizens have the means at the moment to correct this. Many of them, especially outside Quebec, are prepared to advocate and to support substantial changes to the political system if these would result in a responsive and responsible political process, and in responsive and responsible political leaders.(p.96)
>
> Participants' desire for these changes is related to a loss of faith, on their part, that the existing political system will make decisions which reflect their values and aspirations for the country. (p.96)
>
> . . .
>
> The requirment for responsive and responsible leadership . . . is an underlying theme which runs throughout the comments we heard on a wide variety of issues: on management of the economy, on treatment of aboriginal peoplees, on constitutional change and the place of Quebec in the federation, on bilingualism and multiculturalism. In all these areas, citizens have told us they do not feel governed according to their wishes and their fundamental values. (p.98)

For examples of other publications making the same observations, see: P. Boyer, "Is a Mandate From the People on Fundamental Issues Essential to a Healthy Democracy?" (June 1992) 41 *Parliamentary Government* 3 at 3; D. Conacher, over government policy and that the positions taken by their elected representatives often do not reflect the public will.[2] As one might expect, these feelings of alienation have led to numerous suggestions for the reform of our government system to give a greater voice to the people on legislative matters. Typically, these suggestions have focused on the possible institution of direct democracy measures, such as recall provisions which would enable citizens to impeach an elected representative between elections and constituent assemblies or referendum devices which would enable the public to vote directly on legislative proposals.[3] Increasingly, it appears that Canadians want to move away from the top-down, executive approach to government upon which this country was originally founded and move toward the populist "we the people" approach to government which founded other democratic countries, most notably the United States.

Given the apparent demand for some type of democratic reform to this country's government system, then, it seems both necessary and prudent for Canadians to closely

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"Power to the People: Initiative, Referendum and Recall and the Possibility of Popular Sovereignty in Canada" (Spring 1991) 49:2 *University of Toronto Faculty of Law Review* 174 at 177-184; G. Gibson, "Direct Democracy For a People-Run Canada", *Report on Confederation* (November 1978) 25 at 27; G.E. Mortimore, "Why We Need Radical Democracy" (June 1991) *Policy Options* 27; P. Marquis, *Referendums in Canada: The Effect of Populist Decision-Making or Representative Democracy* (Library of Parliament, 1993) at 3-6; L. Panitch, "How Our Democracy Could Work"(June/July 1991) *Canadian Forum* 5 at 5; J. Rosenstock & D. Adair, "Direct Democracy: Let the People Have Their Say" (December 1991) *Canada and the World* 22.

[2] *Ibid.*

[3] *Ibid.* Also note the 1993 election platform of the Reform Party of Canada which included the institution of recall provisions and direct voting mechanisms.

consider and evaluate the possible options for such reform. In the hope of contributing to this discussion, this thesis will focus on the role which direct voting mechanisms might play as national legislative tools in Canada. More specifically, by examining the legislative role served by direct voting in other western democracies, the history of direct voting in Canada, and the philosophical and legal considerations regarding national direct voting in Canada, this paper will argue that direct voting mechanisms can and should be used as national lawmaking tools in Canada.

Before proceeding further, however, some limits upon the scope of this thesis must be noted. First, as noted above, although several direct democracy mechanisms have been suggested as possible devices for reforming Canada's government system, this paper will be limited to a discussion of direct voting mechanisms only. Further, while the terms "direct vote" or "direct voting mechanisms" may otherwise arguably refer to a variety of devices which enable the public to vote directly on legislative issues (including, for example, constituent assemblies), for the purposes of this thesis these terms will be used only to refer to referendums, plebiscites and initiatives.[4] It should be understood,

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[4] The terms "referendums", "plebiscites" and "initiatives" have themselves been subject to a variety of definitions and classifications depending upon the form which a given direct vote takes, the effect of the vote's results and the views of the author discussing the vote in question. For the purposes of this paper, the following working definitions of these terms are offered (based upon J.P. Boyer, *Lawmaking by the People* (1982) at 1-24):

Referendum - a popular vote on a given question initiated by the government and the results of which are intended to be legally binding upon the government. (With respect to the pluralisation of the term "referendum", it seems that "referendums" is the proper reference however, that the decision to limit this thesis to a discussion of direct voting in the form of referendums, plebiscites and initiatives is not intended to be a comment on the importance or viability of any other direct democracy options. Instead, the decision to focus on referendums, plebiscites and initiatives is only indicative of the fact that, because Canada has had some limited experience in utilizing direct votes as national

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to more than one referendum vote, while "referenda" is the proper reference to a single vote involving more than one question).

Plebiscite - a popular vote on a given question initiated by the government and the results of which are not legally binding on the government.

Initiative - a means by which a specified number of voters can initiate a popular vote on a given question, the results of which may or may not be legally binding on the government.

Based on these definitions, it is apparent that, although some direct votes in Canada have historically been referred to as "referendums", they were in fact plebiscites because their results were not legally binding on the government (for example, the 1992 "Referendum" on the Charlottetown Accord).

For the purposes of this paper, "direct votes" and "direct voting mechanisms" will be used to generically refer to referendums, plebiscites and initiatives. Unless otherwise indicated, the terms "referendum", "plebiscite" and "initiative" will only be used by the writer as defined above. Where quotations of other authors are used, however, these terms may not necessarily be used in accordance with the narrow legal definitions noted above. For example, many authors use the term "referendum" to refer to direct votes in general, without consideration for or distinction of the binding or non-binding nature of these votes. References to these terms in quoted material, therefore, must be read in the context of the remainder of the text.

legislative tools and continues to employ direct voting mechanisms at the provincial and local government levels, such votes appear to be a likely option for increasing the democratic nature of our national lawmaking institutions.

The second limit on the scope of this thesis is that this discussion will focus only on direct voting as a *national* legislative tool. Once again, the concentration of this paper on national direct voting mechanisms is not intended to be a reflection on the viability of such mechanisms at other levels of government. On the contrary, the decision to focus on national direct votes is indicative of the fact that direct voting mechanisms are already available and have been used in most provinces and municipalities in the country. Accordingly, the greatest scope for advancing and developing the use of direct voting mechanisms in Canada appears to be at the national level. Moreover, although this paper is directed toward national direct votes, where necessary and appropriate reference will be made to provincial or local government experience.

Finally, it should be noted that this thesis will deal primarily with the *conceptual* legal and constitutional issues which arise with respect to the use of national direct votes in Canada. In other words, this paper will focus on whether national direct votes have a role to play in Canada's national legislative scheme and what that role can and should be given the country's existing constitutional and legal doctrines. Accordingly, although a number of practical legal questions also frequently arise respecting the conduct of national direct votes (such as how the referendum or plebiscite question should be worded, how much time should be allowed for campaigning, how campaign financing should be governed, etc.), these matters will not be dealt with in this thesis. It is the writer's view that, before these practical matters can be considered and resolved, we must decide whether national direct voting has a place in Canada's lawmaking system and what the role of direct voting can and should be.

CHAPTER TWO

DIRECT VOTING IN OTHER WESTERN DEMOCRACIES

From an international perspective, in recent times, referendums and related direct democracy procedures have played a notable role as lawmaking tools at the national level. In fact, with the exception of the United States, in the last century almost every western democracy has held at least one national direct vote.[1] Further, according to a recent worldwide study of constitutions, as of 1993, 53.1 percent of the one hundred and sixty constitutions examined provided for some form of national direct vote. The same study notes that 35 percent of these constitutions permitted constitutional questions to go to a direct vote while 19.4 percent of these constitutions provided for direct votes to be held on non-constitutional matters.[2] In light of these statistics, it appears that, by taking a closer look at how national direct votes have been employed in other countries, much can be learned about the possible functions, benefits, and pitfalls which national direct votes could play in Canada in the future.

Because a thorough analysis of the use of direct voting procedures in all of the countries of the world is well beyond the scope of the present discussion, this Chapter will focus on the direct voting experiences of eight western democracies: Australia, the United Kingdom, Switzerland, the United States, Sweden, Finland, Italy and Ireland. The first four of these countries are considered in some detail because each of these countries is either closely related to Canada in terms of political theory or legislative structures or has a particularly extensive experience with direct democracy. The remaining four countries will be dealt with more briefly as they are intended to serve primarily as random examples of how other western European democracies have approached the question of direct voting.

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[1] M. Dunsmuir, *Referendums: The Canadian Experience in an International Context* (Library of Parliament, January 1992) at 1. For a detailed list of nationwide referendums held throughout the world until 1978, see *Referendums: A Comparative Study of Practice and Theory* (ed. by D. Butler & A. Ranney, 1978) at 227-237 (Appendix "A").

[2] M. Suksi, *Bringing In the People: A Comparison of Constitutional Forms and Practices of the Referendum* (1993) at 137-139.

I. THE UNITED KINGDOM

Nationally, the United Kingdom is governed by essentially the same multi-party Parliamentary system of government as was ultimately imported into Canada. The United Kingdom, however, does not have a written constitution and, accordingly, the British Parliament operates under a series of unwritten constitutional conventions. Traditionally, these conventions have placed heavy emphasis on the sovereignty of Parliament and the principles of responsible, representative government, thereby leaving little room for the implementation of direct democracy procedures. Britain has never had any constitutional requirement that the people be directly consulted with respect to any national issues nor has it had any standing legislation requiring or enabling national direct votes to be held. Accordingly, Britain's experience with national direct voting has been extremely limited, with the country's only nation-wide referendum being held in 1975 on the question of Britain's continued involvement in the European Economic Community (EEC).[3]

Although only one national direct vote has ever been held in the United Kingdom, even prior to 1975 the idea of holding direct votes to resolve difficult political issues had been raised on several occasions. For example, direct voting was advocated in the 1890's as a method of resolving constitutional matters such as Irish home rule and, in the early 1900's, as a means of breaking deadlocks between the House of Commons and the House of Lords. In the 1920's, Winston Churchill suggested holding a nation-wide vote on the equalization of men's and women's franchises, and in the 1940's he advocated holding such a vote to extend the term of the wartime coalition government.[4] It has been noted that, in most of these cases, direct voting was suggested by Conservative government members who saw referendums as a "brake on change."[5] Further, although most of these proposals for direct votes were apparently challenged and defeated by the argument that direct democracy is inherently incompatible with the Britain's Parliamentary tradition, it has been suggested that these proposals and their failures may actually be attributable to more pragmatic, political concerns:[6]

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[3] Technically, Britain's 1975 vote on the EEC was a "plebiscite" and not a "referendum" because the vote was not binding on the government. (See Chapter I, n.4 for definitions of these terms). Notwithstanding this technical distinction, however, in Britain the vote became popularly referred to as a referendum. Accordingly, this vote may be periodically referred to as a referendum in this text.

[4] *See: Understanding Referenda: Six Histories* (Library of Parliament, 1978) at 32 and D. Butler, "United Kingdom", in *Referendums: A Comparative Study of Practice and Theory*, *supra* n.1, 211 at 211-212.

[5] Butler, *ibid.*, at 211-212.

> In the past, therefore, there have been several attempts to justify the use of referenda on theoretical grounds. Referenda have been portrayed as instruments for furthering local autonomy, for ensuring the people a voice in policy-making, and for checking the power of the legislature. They have been opposed on equally theoretical and abstract grounds. But little of this constitutional theorising has directly influenced political practice. The decision on whether or not to adopt referenda has been determined on grounds of political or administrative expediency. That referenda have in practice rarely been employed is evidence less of the devotion of past British political leaders to constitutional propriety than of the extensive political difficulties and practical problems which referenda have posed.

In any event, although none of Britain's proposed national direct votes prior to the EEC referendum came to fruition, the country did have some experience with the use of direct voting on a local or regional level. In fact, since the late 1800's, local polls have been held in the United Kingdom on matters such as free public libraries, municipal legislation, liquor licensing, and Sunday openings.[7] More significantly, when violence in Northern Ireland led to Great Britain's suspension of the government and parliament of Northern Ireland, a referendum was held in March 1973 amongst voters of Northern Ireland to determine whether the province should remain part of the United Kingdom.[8]

Since the 1960's, Britain had been struggling over the question of what role, if any, it should play in the EEC.[9] Because of the controversy surrounding this issue, the idea of holding a national direct vote on whether the country should join the EEC was raised on several occasions. It was only after Britain's entry into the EEC, however, that this idea gained the support of a major political party. At that point, it was adopted as part of the Labour Party's policy platform.

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[6] R. J. Williams & J. R. Greenaway, "The Referendum in British Politics: A Dissenting View" (Summer, 1975) 28 *Parliamentary Affairs* 250 at 256.

[7] *Ibid*. at 251-252. See also Butler, *supra* n.4 at 212.

[8] For further discussion on this point, see Butler, *ibid*., at 251-252.

Around the time of the country's entry into the EEC, the Labour Party took the position that the terms of Britain's membership in the EEC as agreed to by the Conservative government were unacceptable and should be renegotiated. This official party policy apparently concealed a number of divergent views within the Labour Party, some of which were much more hostile to the country's membership in the EEC than the official policy implied.[10] With the approach of the national election in February, 1974, the Labour Party reconsidered its position and developed a policy stand which suggested that the terms of Britain's membership in the EEC should be renegotiated and that the electorate should then be given the opportunity to vote directly on the acceptability of these new terms. This new party policy "allowed the Labour Party to appeal to both those who were altogether opposed to Britain's entry into the EEC and to those who were dissatisfied with the terms of Britain's membership."[11] Still, the Labour Party's proposal to hold a referendum on the EEC issue resulted in significant debate over the appropriateness of incorporating direct voting mechanisms into the British Parliamentary system. The main arguments against holding a referendum included the idea that direct voting would improperly derogate from the power of elected representatives and that direct voting might result in an eroneous decision because the public lacked the knowledge and expertise required to make the best decision on the matter.[12]

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[9] For a further discussion of various opinions and the controversy raised over Britain's role in the EEC, see: Butler, *ibid.* at 213 and B. Sarlvik et al., "Britain's Membership of the EEC: A Profile of Electoral Opinions in the Spring of 1974--With a Postscript on the Referendum" (1976) 4 *European Journal of Political Research* 83.

[10] Sarlvik, *ibid.*, at 84.

[11] *Ibid.* See also *Understanding Referenda: Six Histories*, *supra* n. 4, at 33.

The election of February 1974 brought the Labour Party to power with a minority government under the leadership of Harold Wilson. That spring, in accordance with the party's election policies, Wilson's government asked the EEC to renegotiate the terms of Britain's membership. These renegotations were successfully concluded in March, 1975. In the meantime, on January 23, 1975 Wilson had advised Parliament that a national referendum on Britain's continued membership in the EEC would be held once the renegotiations were completed.[13] Around the same time, because Britain did not have any standing legislation enabling such a referendum to be held, the government began the process of drafting special legislation authorizing the referendum and setting out the necessary procedures for its implementation. Accordingly, in May, 1975, the *Referendum Act, 1975*[14] was passed.

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[12] For a detailed discussion of the arguments raised for and against the EEC referendum, see: J. P. MacKintosh, "The Case Against a Referendum" (January 1975) 46 *Politics Quarterly* 73 and T. Wright, "The Referendum: The Case Against John MacKintosh" (April 1975) 46 *Politics Quarterly* 153.

[13] *Understanding Referenda: Six Histories, supra* n. 4 at 33.

[14] Statutes of U.K., 1975, c. 33.

The *Referendum Act, 1975* authorized a national referendum to be held on the question: "Do you think that the United Kingdom Should Stay in the European Community (Common Market)?" The Act did not make the referendum results binding on the government, however, the government did voluntarily make some other concessions with respect to the conduct of the referendum campaigns and the counting of votes. For example, breaking with traditional Parliamentary practice, the government relaxed the principles of party discipline by permitting government members to campaign on either side of the referendum question rather than necessarily supporting the government's position. It has been suggested that this approach "made plain a fact, of which no one could be in doubt, that the prime purpose of the referendum was to save the Labour party from tearing itself asunder while securing for the nation a firm and final verdict on EEC membership."[15] In a further break from traditional practice, rather than having the referendum votes counted by constituency, the government permitted the votes to be tabulated by county. This change was made to prevent any government member from being embarrassed should his position on the referendum question have turned out to be different from that of his constituents.[16]

The referendum was held on June 5, 1975 and the results demonstrated significant support in favour of Britain remaining in the EEC. Approximately 64.5 percent of the electorate of over 40 million people voted in the referendum and, of these voters, approximately 67.2 percent cast ballots supporting the resolution.[17] The Shetland Isles and the Western Isles of Scotland were the only two voting areas which failed to support Britain's continued membership in the EEC.[18] Accordingly, the referendum results did not reveal any marked regional differences of opinion within the nation.

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[15] Butler, *supra* n. 4, at 214.

[16] *Ibid*.

The most obvious result of the 1975 referendum was that Britain remained a member of the EEC. On a less tangible level, however, the referendum arguably also had a significant effect on British politics and legislative history. First, although the referendum was not binding on the government, the strong result in favour of continued EEC membership may have allowed the Labour Party to maintain its governing position and its party solidarity:[19]

> Although it was only an advisory referendum, Wilson had said that he would take an adverse majority, however small, as a mandate for leaving the European Community. But it is very doubtful if his government could have survived defeat on the issue; the committed pro-Europeans in the party would not have taken a reverse as resignedly as the anti-Europeans in fact did. . . . Wilson had striven to take the referendum outside the ordinary rules of responsible Cabinet government, but it is doubtful if he managed to do so. It was, in some measure, a vote of confidence in the government, and defeat would almost certainly have meant disaster.

Second, in answer to the critics of direct democracy who had seen the pending EEC vote as "a Trojan horse . . . smuggled into the constitutional citadel in preparation for its overthrow"[20], the referendum demonstrated that a national direct vote could take place in the United Kingdom without destroying the country's traditional system of Parliamentary democracy. In fact, the 1975 referendum demonstrated that a direct vote could be "conducted in a tranquil and efficient manner", settling a contentious issue without leaving any "serious constitutional repercussions."[21]

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[17] *Understanding Referenda: Six Histories*, *supra* n. 4, at 39.

[18] *Ibid.*

[19] Butler, *supra* n. 4, at 215.

It does not appear, however, that the EEC referendum has had any significant practical impact on the traditional British paths of legislative or constitutional change. Prior to the EEC vote, some opponents of the referendum had been fearful that a direct vote on the EEC would set a precedent, leading to the common use of referendums as part of Britain's arsenal for legislative or constitutional change:[22]

> If Britain adopts the referendum, it may do so in order to register popular sentiment towards the Common Market. But the wider result is likely to be a new way of deciding or 'consulting' on a great variety of major political issues. Today the EEC, tomorrow independence of Scotland and Wales, thereafter hanging and flogging. If the referendum is a useful device, we can be quite sure that its usefulness will be realized and exploited outside, as well as within, the Labour Party.

Although some analysts suggest that because the referendum device worked in 1975 it is more likely to be used again,[23] in the nearly twenty years since the EEC vote Britain has not held another national direct vote to resolve a contentious legislative or constitutional question. While the idea of holding a nation-wide vote on such matters has periodically been raised since 1975,[24] (much as it was prior to the EEC vote), to date the British government has not been eager to implement this procedure notwithstanding the apparent success of the EEC referendum. Since the EEC referendum, however, direct votes have continued to be held on a local and regional basis, including the March 1, 1979 vote in Scotland and Wales on the question of devolution.[25]

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[20] Williams & Greenaway, *supra* n. 6, at 250.

[21] Butler, *supra* n. 4, at 216.

[22] C. Braham and J. Burton, "The Referendum Reconsidered" (March 1975) *434 Fabian Tract* 1 at 1-2.

II. AUSTRALIA

Like Canada, Australia operates under a written federal constitution founded on the Westminster Parliamentary model and reflecting the British principles of Parliamentary Supremacy and responsible government. Australia's six states and two territories have their own local governments and are joined into a federation by a single national government. With respect to this national government, the *Commonwealth of Australia*

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[23] Butler, *supra* n. 4, at 219.

[24] For example, since 1975, the idea of holding a national referendum has been suggested as a means of settling disputes between the two houses of Parliament, of concluding industrial disputes, and of resolving the capital punishment issue. For further discussion on this point, see Butler, *ibid.*, at 217-218.

[25] For further discussion of these direct votes, see: "Scottish & Welsh Devolution Referendum of 1979" (August 1979) 32 *Parliamentary Affairs* 294 and B. Jones & R. Wilford, "Further Considerations on the Referendum: The Evidence of the Welsh Vote on Devolution" (March 1982) 30 *Political Studies* 16.

Constitution Act[26] establishes a bicameral Parliament, consisting of a House of Representatives and a Senate, both of whose members are directly elected through a system of preferential voting.

Unlike Canada, however, the constitution of Australia also expressly recognizes, provides for, and, in some instances, requires national direct votes to be held. Specifically, according to Section 128 of the Australian constitution, in order for an amendment to the federal constitution to take effect, the proposed amendment must be passed by an absolute majority of each House of Parliament and be ratified by a referendum held not less than two or more than six months after the amendment's passage through Parliament.[27] The proposal may also be submitted to the electors if it is approved twice by one of the Houses of Parliament even though it has been objected to by the other House. In either case, once submitted for a referendum, the measure is accepted for the Governor-General's assent only if it is approved by a majority of all the electors voting and by a majority of voters in a majority of the states. Voting on constitutional referendums is compulsory.[28]

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[26] (U.K.) 63 & 64 Victoria, c. 12. Note that the Australian constitution properly refers to national direct votes as "referendums" because they are binding on the government.

[27] There is no requirment that proposed amendments be introduced by the governing party and bills proposing constitutional change can be sponsored by the opposition or private members. (See D. Aitkin, "Australia" in *Referendums: A Comparative Study of Practice and Theory*, *supra* n. 1, 123 at 130). In practice, however, the government has such control over parliamentary business that a proposal not sponsored by the government is unlikely to gain the support of both Houses of Parliament as required.

[28] Dunsmuir, *supra* n.1 at 42. Since 1924, voting in Australia has been compulsory.

From 1906 to 1992, forty-two proposed amendments to the Australian constitution have been put to the people in referendums on eighteen separate occasions. Of these forty-two proposals, only eight have received the required approval and resulted in an amendment taking place.[29] Five of these successful amendments involved relatively minor matters relating to government operations, voting and public finance while three of these amendments involved more substantive matters such as social services, financial agreements regarding state debts and authority over aboriginal matters.[30] Of the thirty-four rejected proposals, five failed to win the support of a majority of electors in a majority of states and twenty-nine failed to secure the support of either required majority.[31] The failed amendment proposals have ranged in topic from the expansion of the federal government's authority over economic matters to the reorganization of government institutions or machinery.[32] Additionally, at least four of Australia's failed constitutional referendums have dealt with "omnibus" amendments, where voters were asked to cast a single vote in favour of or against a list of specific constitutional amendments. None of these four proposals obtained the required degree of voter approval.[33]

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[29] C. Vander Ploeg, "Letting the People Decide: A Canadian Constitutional Referendum", *Canada 2000: Towards a New Canada* (Canada West Foundation, 1993) at 19.

[30] B. Galligan, "The 1988 Referendums and Australia's Record on Constitutional Change" (October 1990) 43 *Parliamentary Affairs* 497 at 503.

[31] *Ibid.*, at 497.

[32] *Ibid.* at 503-504.

Three explanations are commonly put forward to explain Australia's low success rate with referendums on constitutional matters. First, this problem is often attributed to the high level of partisanship inherent in Australian politics, with ninety percent or more of the electorate commonly loyal to one party.[34] In the context of the country's constitutional referendum requirements, this high degree of partisanship means that a referendum proposal will not pass unless "there is at least a fair measure of agreement between the major parties that the change is necessary."[35] In the case of many of the failed referendum proposals, this consensus among political parties has been lacking. The correlation between high party interests and failed referendum results can also be seen by the fact that only three of the twenty-one referendum questions posed in conjunction with a general election have succeeded.[36]

The second explanation commonly given for the failure rate of constitutional referendum votes concerns the nature of the proposed amendments and the federal political structure of Australia. Because the Australian constitution expressly outlines the powers to the federal government and leaves all residual powers to the state governments, most proposed constitutional changes have involved the transfer of power from the states to the federal government or the creation of completely new federal powers.[37] Accordingly, the proposed constitutional amendments frequently form the substance of a battle between federal and state powers and, in these circumstances, the Australian people have been reluctant to approve proposals which might jeopardize the position of the states.[38] Given the double majority requirements for a successful constitutional amendment, state loyalties impact significantly on referendum results.

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[33] Vander Ploeg, *supra* n. 29, at 20.

[34] Aitkin, *supra* n. 27 at 133.

[35] *Ibid.*

[36] *Ibid.* at 132 - 135. See also Vander Ploeg, *supra* n. 29, at 20.

Finally, there appears to be some consensus among political analysts that much of the referendum failure rate in Australia is attributable to the ignorance and apathy of the voters.[39] According to this view, Australians tend to be uninformed and uninterested in constitutional matters, casting their referendum ballots blindly along party lines without any real knowledge of the issues involved:[40]

> Enough has been said to make it clear that the task of the citizen at an Australian referendum is not an easy one. At the same time, however, the citizen is not well equipped for his task. Australians combine high levels of partisanship with generally low levels of political interest. As a result, the party position on a given question tends to determine that of the citizen. Not only is the Australian constitution a legal document of some aridity, but there is no tradition of teaching it in the schools. In contrast to the United States, Australia is a nation which takes its constitutional past very much for granted, and the great majority of

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[37] Aitken, *supra* n. 27, at 129.

[38] *Ibid*. See also Galligan, *supra* n. 30, at 501 and Vander Ploeg, *supra* n. 29, at 19-20.

[39] See Aitken, *supra* n. 27 at 135 and Galligan, *supra* n. 30 at 501.

[40] Aitken, *ibid*., at 135.

> citizens grow up with only the vaguest understanding of the constitutional arrangements of their polity. A referendum on the constitution is therefore something of a crisis.

It has also been suggested that the apathy of Australian citizens is exacerbated by the short referendum campaign period set out in the constitution[41] and by the failure of political parties to educate the voters on the meaning and significance of proposed amendments.[42] Further, while the data does not clearly indicate what effect Australia's compulsory voting requirements have on the referendum approval rate, it has been suggested by some scholars that "forcing the uninterested or relatively apathetic to cast a vote is akin to adding more 'no' votes to the ballot boxes" because an uninterested voter is most likely to opt for the status quo.[43]

Finally, in addition to the three explanations noted above, it has also been suggested that Australia's poor rate of successful constitutional referendums is attributable to the fact that constitutional amendment has not really been required. This view suggests that major constitutional change is generally associated with regime changes and national restructuring, neither of which have been present in Australia in recent years:[44]

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[41] *Ibid.*

[42] *Ibid.* at 130.

[43] Vander Ploeg, *supra* n. 29, at 20. See also Aitkin, *supra* n. 27, at 131 - 132 and Galligan, *supra* n. 30, at 501.

[44] Galligan, *ibid.*, at 505.

> Australia's modest record of formal constitutional change is to be expected given the absence of revolution, conquest and political dictatorship, or regionally based ethnic and linguistic communities and the fact that the Australian constitution was a fully democratic instrument of government from the start. . . the Australian constitution is a relatively flexible instrument of government that is being reinterpreted periodically by judicial review and adjusted by the push and pull of intergovernmental politics.

This argument, however, could be used to explain any country's lack of successful constitutional reform regardless of the existence or non-existence of direct voting mechanisms for such reform. Accordingly, this argument may say more about the general potential for constitutional change in a stable nation than it says about the role of referendums in achieving constitutional change.

Despite the low success rate of Australia's constitutional referendums and the various explanations for same noted above, it is important to recognize that many of the country's constitutional referendums have failed by a narrow margin. In fact, thirteen of the thirty-four failed referendums were very close to succeeding. Three of these referendums received a majority of the state votes but just under fifty-percent of the overall vote, nine of these referendums received a clear majority of the overall vote and a majority in three of the six states, and one of these referendums received just under fifty-percent of the overall vote and a majority vote in only three of the six states.[45] Overall, then, it currently appears that the major obstacle to constitutional change in Australia may be the strict requirement that the proposed amendment be approved by a majority of states as well as a majority of the total voters. Arguably, this requirement simply reflects the view that constitutional change *should* be difficult to achieve because it affects a nation's fundamental character.

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[45] Vander Ploeg, *supra* n. 29, at 21.

Outside of the realm of constitutional reform, Australia has a very limited history of national direct votes. Up to 1991, only three such votes have been held in Australia since Confederation: two on the question of conscription in 1916 and 1917 and one on the preferred national song in 1977.[46] Like Canada, Australia does not have any constitutional provisions or standing legislation permitting legislative national referendums to be held.

III. SWITZERLAND

In its general political structure, Switzerland is similar to Canada in that it operates as a federation of provinces (Switzerland has 26 provinces or cantons) united under a national government. Unlike Canada, however, while the national legislative power in Switzerland rests with a bicameral Federal Assembly (composed of a National Council and a Council of States), the constitution of Switzerland places ultimate power with the people through frequent access to the referendum process,[47] making Switzerland the

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[46] *Yearbook Australia* (Australian Bureau of Statistics, 1991) at 30. See also Aitken, *supra* n. 27 at 123.

[47] *Federal Constitution of the Swiss Confederation*, 1874. See in particular Articles 89, 90, 120, 121, 122 and 123. Note that national direct votes in Switzerland are binding on the

"home of the referendum."[48] The Constitution of Switzerland relies on the principles of direct democracy both for constitutional change and ordinary legislation to a degree which is unrivaled by any other country.

The Swiss constitution provides that, in order for constitutional amendments to be adopted, all such proposals must be subjected to a national referendum in which they are approved by a majority of voters and a majority of voters in a majority of cantons. Constitutional referendums must be held on amendments which have been approved by both Houses of Parliament or which have been put forward by citizens through a popular initiative. The initiative procedure permits the public to place a constitutional amendment proposal on the referendum ballot if the proposal is supported by a petition bearing 100,000 citizen signatures, gathered within an eighteen month period. If the proposal is agreed to by both Houses of Parliament, it is immediately submitted to a referendum vote. If the Houses of Parliament cannot agree on the proposal, however, the general question of whether to amend the constitution is put to a referendum and, if this question is approved, Parliament must then draft the proposed amendment which is then put to the people again. Where a popularly initiated amendment is put to a referendum, Parliament has the option of putting forth a counter proposal which is voted upon in the same referendum. Regardless of whether the constitutional amendment is proposed by

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government and accordingly are accurately described as "referendums" in the Swiss constitution.

[48] J. Aubert, "Switzerland", in *Referendums: A Comparative Study of Practice and Theory*, *supra* n.1, 39 at 66.

Parliament or by the citizenry, the results of the referendum are binding on the government.[49]

The Swiss constitution also enables referendums to be held on ordinary legislation. Legislation involving international treaties and a number of budgetary matters must be approved through mandatory referendums. Additionally, while citizens are not allowed to initiate ordinary legislation, a referendum on ordinary legislation must be held when 50,000 citizens have signed a petition demanding a vote on a law being proposed by the government. Ordinary legislation subject to a referendum is approved or abrogated by a simple national majority of voters. As in the constitutional context, the results of the referendum vote are binding on the government.[50]

From 1848 to 1991, Switzerland has held 280 constitutional referendums, 141 of which obtained the requisite citizen approval and 139 of which failed to obtain the required approval. Although these figures suggest a fifty percent success rate for constitutional referendums, further analysis of the data shows that the success of a proposed constitutional amendment appears to depend heavily upon the source of the amendment. For example, over the same period of time, one hundred and seventy-four constitutional amendments or counter-proposals were advanced by the government, with one hundred and thirty-one (or approximately seventy-five percent) of these proposals succeeding in a referendum. Of the one hundred and six proposals initiated by the citizenry, only ten passed the referendum requirements. On the thirteen occasions when popular initiatives were countered by a government proposal in the same referendum, both proposals were rejected by voters on five occasions and the popularly initiated proposal succeeded on only two occasions. With respect to referendums on ordinary legislation, from 1848 to 1991, one hundred and three legislative referendums were held, with forty-five of these referendums passing and fifty-eight being rejected.[51]

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[49] The foregoing details can be found in Articles 120-123 of the Swiss constitution, *supra* n. 47.

[50] These details can be found in Article 89 of the Swiss constitution, *ibid*.

Two main arguments are commonly put forward to explain the relatively high success rate of referendums on government initiated amendment as compared to popularly initiated amendments. First, popular initiatives are generally put forward by minorities or special interest groups whose views do not reflect the concerns or interests of the broader community or the federal government.[52] As one analyst suggests, "If the issue were a popular one, parliament would already have taken action without being pushed from outside."[53] Additionally, because popularly initiated proposals tend to come from interest groups, these proposals typically involve ideas which are more progressive than those which are supported by the government or the mainstream of Swiss society.[54] On the other hand, where enough popular opposition exists for a referendum to be successfully demanded on ordinary legislation, the law has a good chance of being successfully rejected in the referendum vote because the demand for the referendum itself is a "sign of ill temper in a section of the population" with respect to the proposed law.[55]

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[51] Vander Ploeg, *supra* n. 29, at 15 - 16.

[52] *Ibid*. at 17. See also Aubert, *supra* n. 48, at 46.

[53] Aubert, *ibid*., at 46.

[54] *Ibid*. See also Vander Ploeg, *supra* n. 29, at 17.

A second reason commonly advanced to explain the relative success of government initiated amendments stems from the government's awareness that its proposal will ultimately be subject to a referendum vote. It is suggested that this awareness leads the government to prepare its proposals with an eye to public opinion and to try to gather support for its proposals long before the referendum campaign begins:[56]

> Parliament is dealing with bills which it knows will be subject to a popular vote, and it prepares them with appropriate prudence, seeking the good will of voters through compromises and by offering guarantees . . . their anxiety to secure a favorable vote leads the federal parliament to redraft passages at length.

In other words, because the Swiss government realizes that it is governing under the threat of referendum, it styles its legislation and constitutional proposals in a manner which is sensitive to the public perception.[57] Unlike the Australian situation, party loyalties are weak in Switzerland and therefore the governing parties cannot rely heavily upon party supporters for a measure to pass the referendum process.[58]

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[55] Aubert, *supra* n. 48, at 46.

[56] *Ibid*. at 45.

[57] Vander Ploeg, *supra* n. 29, at 17.

One trend often noted with respect to Swiss referendums is the low voter turnout. In recent years, the voter turnout has averaged approximately 40 percent.[59] Additionally, the majority of voters currently tend to be between 40 and 60 years of age, male, well educated and affluent.[60] Although these statistics have led to speculation that few voters participate because of the frequent number of referendums held in Switzerland, this theory remains unproven. In fact, on the contrary, studies have shown that low voter turnout is common in Switzerland not just for referendums but also for general elections and that the number of referendums held within a given year only has a "marginal impact" upon the degree of voter turnout.[61]

Another theory which has been offered to explain the low voter turnout in Switzerland is that most of the country's referendums are very issue specific and that the referendum agenda is controlled by small interest groups. Because citizens are only permitted to initiate constitutional, as opposed to legislative, amendments, the constitution has become extremely detailed and many of the referendums held on constitutional questions concern extremely narrow issues rather than matters having a broad popular appeal.[62] Additionally, it has been noted that:[63]

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[58] Aubert, *supra* n. 48, at 48.

[59] Vander Ploeg, *supra* n. 29, at 18.

[60] D. MacDonald, "Referendums and Federal Elections in Canada", *Democratic and Electoral Reform in Canada* (ed. by M. Cassidy, Vol. 10, Research Studies, Royal Commission on Electoral Reform and Party Financing, 1991) at 317.

[61] Vander Ploeg, *supra* n. 29, at 18.

> The benefit direct democracy offers to specific groups within the Swiss political system does not support the conclusion that the existence of popular referenda and initiatives increases elite responsiveness to public demands. Rather, it takes power away from the public and the elected representatives of the smaller political parties. Power is partially transferred by the existence of referenda and initiatives to established interest group leaders who are responsible to no one.

Accordingly, as one writer notes:[64]

> Public opinion surveys have shown that non-voters in Switzerland have low levels of political efficacy. This widespread sense of 'political helplessness' is anomalous in a nation where the role of the individual citizen is the foremost concern of the governing process.

Thus, while Switzerland may initially appear to be one of the most politically responsive countries in the world because of its liberal use of referendums and popular initiatives, given the low level of voter participation in these direct voting measures it is questionable how much the referendum and initiative procedures actually empower the people in practical terms.

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[62] *Ibid.*

[63] M. Mowlam, "Popular Access to the Decision-making Process in Switzerland: The Role of Direct Democracy" (Spring 1979) 14 *Government & Opposition* 180 at 195.

[64] MacDonald, *supra* n. 60, at 317.

IV. THE UNITED STATES

Although the United States is often hailed as a paradigm of democracy in the modern world, this country remains one of the few democratic nations that has never held a nation-wide referendum or plebiscite. On a national level, the United States has never ventured from its representative system of lawmaking and neither the country's constitution nor any of it federal legislation has ever enabled a national direct vote to take place. Despite this notable lack of national direct democracy experience, however, the United States does boast considerable experience with direct votes at the state level. In fact, far more referendums and initiatives have been held in the American states than in all other international jurisdictions combined.[65] Accordingly, in comparing the direct democracy experience of various countries, it is important to examine the United States, both for its lack of national direct voting experience in the face of its democratic heritage, as well as for its considerable use of direct democracy mechanisms at the state level.

The United States' total lack of direct democracy experience at the national level is not easily explained, particularly in light of the overall populist approach taken by the writers of the American constitution. While the drafters of the American constitution apparently went to great lengths to remove legislative power from the hands of a single ruler or monarch and to place this power in the hands of the people, these writers also failed to provide the people with authority to conduct national direct votes. As a result, while the American constitution avoids the constraints of Parliamentary sovereignty encountered by some other countries, it falls short of granting ultimate lawmaking authority to the electorate:[66]

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[65] *Ibid.*

> . . . it is worth drawing a distinction between the English constitutional inheritance in which 'the exercise of constituent powers, in all its stages, by a representative body without a special mandate . . . makes Parliament sovereign', and 'the American (or French) theory which in this matter has replaced 'the King, the Lords, and the Commons' by the people.' In spite of this difference, however, no referendum provisions were written into the Constitution of the United States of America, nor were there any in the Articles of Confederation. Instead the institution of the referendum was adopted in certain states of the Union only, and in some cases very much later.

It has been suggested that the framers of the American constitution chose to avoid including direct democracy measures because of an inherent conservatism which manifested itself in the concern that direct votes would result in mob rule by uncontrollable majorities and that direct votes would be impractical to institute in such a vast geographical area, particularly when many parts of the federation lacked the administrative structures to facilitate such votes.[67] Accordingly, while ostensibly committed to the "power of the people" and suspicious of monarchical or aristocratic institutions, the drafters of the American constitution apparently remained distrusting of the people's ability to govern themselves:[68]

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[66] M. Suksi, *supra* n. 2, at 58.

[67] For a more detailed discussion of these suggested rationale, see M. Suksi, *ibid.*, at 61-63.

> The framers of the constitution, of course, had no use for direct action by the people to govern themselves through plebiscites, referendums or straw polls. Many of them even worried about rule by popular majorities. The framers considered there was often a distinction between public opinion and public interest. Prudent judgment about the national interest, they held, should be shaped by debate and deliberation among highly informed representatives of the people.

Given this view, the drafters of the American constitution chose to limit the country's reliance on democratic procedures by providing the public with a legislative voice only through elected representatives.

Although direct democracy mechanisms have never formed a part of the federal government structure in the United States, movements to institute such procedures have arisen several times since the original drafting of the American constitution. Pressure for national referendums was especially notable from 1890-1912 as part of the populist or progressive movement, from 1914-1940 as part of the isolationist or peace movement, and from 1970-1988 as part of a growing interest in issue activism.[69] Further, from 1927 to 1941, more than 8 percent of the proposed amendments to the American constitution dealt with different forms of referendums[70] and the United States Congress has even held hearings on proposed constitutional amendments to provide for a national initiative. While such proposals have often been supported by prominent American politicians, to date all of these reforms have been rejected. Accordingly, it would seem that, even today, the people's representatives do not trust the American electorate enough to endorse national direct votes.

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[68] T. E. Cronin, "Public Opinion and Direct Democracy" (Summer, 1988) 21 *PS* 612 at 613.

[69] Suksi, *supra* n. 2, at 59.

As already noted, however, despite the country's lack of direct democracy experience at the federal level, the United States has a great deal of direct voting experience at the state level. Currently, direct voting measures are available in a number of states, although the form which these measures take, the requirements for their use, and their legislative effect varies considerably from state to state.[71] Generally, the forms of direct democracy available at the state level can be divided into four categories: constitutional referendums, statutory referendums, constitutional initiatives and statutory initiatives.[72] In essence, the referendum procedures allow voters to accept or reject a legislature's proposals regarding the state constitution or ordinary legislation, while the initiative procedures allow voters (usually through a petition) to submit their own proposed constitutional amendments or legislative provisions to a public vote. Accordingly, "the initiative corrects for legislative sins of omission, while the referendum allows for correction of legislative sins of commission."[73]

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[70] *Ibid.* at 64-65. See also pages 64-69 for a more detailed discussion of the various movements supporting direct democracy measures on the national level.

[71] *Ibid.* at 91. According to Suksi, as of 1993, constitutional referendums were incorporated into every state constitution except Delaware. Further, twenty-six states plus the District of Columbia had even more developed concepts of referendums included in their constitutions. Twenty-one states provided for statutory referendums and initiatives, three states had referendums only and two states had initiatives only.

[72] This classification is suggested by A. Ranney, "United States of America", in *Referendums: A Comparative Study of Practice and Theory*, *supra* n. 1, 67 at 69.

Generally, the most commonly used direct voting procedure at the state level is the constitutional referendum, where a proposal for amending the state constitution is placed on the ballot by state legislatures.[74] Still, this proliferation of constitutional referendums at the state level is not necessarily indicative of an overall commitment to direct democracy in the area of constitutional reform. On the contrary, it has been suggested that this frequent use of constitutional referendums may arise because of the number of matters covered in the states constitutions:[75]

> The widespread use of the referendum in American states arises directly from the lengthy and detailed character of their constitutions. Generally containing a mass of technical verbiage on such subjects as taxation, utility regulation, and the like, the typical state constitution is the length of a small paperback book. Such a document requires continual and extensive amendment to maintain its viability in a changing social and economic environment; a great deal of state legislative activity--compared to that in the national Congress, for example,--is devoted to the consideration of constitutional amendments.

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[73] D. Magleby, "Is Direct Democracy a Failed Democracy?" (July/August 1985) 18 *The Center Magazine* 51 at 52.

[74] E. C. Lee, "The American Experience, 1778-1978", in *The Referendum Device* (ed. by A. Ranney, 1981) 46 at 49.

[75] *Ibid*.

Accordingly, given the complex nature of the typical state constitution, where a state constitution demands a direct vote to authorize constitutional amendment, it appears that a large number of state referendums may be inevitable.

Most of the states presently employing direct democracy measures adopted these provisions in the early part of the twentieth century as a result of the Progressive political movement. At the time of their institution, these direct voting procedures were seen as a means of restraining and controlling the people's elected representatives:[76]

> . . . these measures--most of which were adopted in the first two decades of the twentieth century--were believed by their Progressive authors to be an instrument to neutralize the power of special interest groups, to curtail corruption on the part of political machines, to provide a vehicle for civic education on major policy issues, to create pressures on state representatives and governors to act on specific measures, and, when they failed to act, to bypass these representative institutions altogether, in short 'to make every man his own legislature.'

Although the direct voting procedures available in the states have been and continue to be used on a regular basis, the extent to which these measures can be said to have achieved the above goals is uncertain at best.

Undoubtedly, the direct voting mechanisms and the initiative procedures available in many states have resulted in many topical and controversial issues being placed on the

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[76] *Ibid.* at 48.

ballot.[77] Still, studies have shown that, rather than being a tool of the common man, American direct democracy procedures are more commonly used by the higher educated, wealthy and white segments of the population.[78] Moreover, the groups most commonly relying on and employing direct democracy procedures (particularly the initiative measures) are usually the same special interest groups which otherwise lobby the legislatures, arguably resulting in the political elite once again setting the lawmaking agenda:[79]

> Direct legislation and direct democracy give tremendous power to the persons who can determine the issues placed before the voters at the next election. It has in some instances served as a potent check upon special interests, a reluctant legislature, or both. But more often those who use the process either can afford the costs of the initiative industry or rely upon highly motivated volunteers to meet the signature threshold. Interestingly, the initiative issue agenda only rarely reflects the concerns voters list as the most important problems facing government.

It has been suggested that these interest groups dominate and promote the use of direct voting in order to get around the legislature's refusal to pass certain legislation, to have legislation adopted in a particular form rather than being subject to amendment by the legislature, to ensure that desirable legislation cannot be altered without another vote by the people, and to educate the public toward the group's viewpoint.[80]

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[77] Direct democracy issues voted on at the state level have ranged from social concerns such as women's suffrage to prohibition and racial equality to political issues such as limitations on gubernatorial terms and taxation. See Lee, *ibid* at 50-51.

[78] See Magleby, *supra* n.73, at 54; Lee, *supra* n. 74, at 55; and D. Magleby, "Taking the Initiative: Direct Legislation and Direct Democracy in the 1980s" (Summer 1988) 21 *PS* 600 at 608.

[79] Magleby, "Taking the Initiative: Direct Legislation and Direct Democracy in the 1980s", *ibid.*, at 607. See also Lee, *ibid.*, at 50-51.

Notwithstanding the activities of special interest groups in pressing for direct votes, however, the data on the state referendum and initiative procedures suggests that legislation or constitutional amendments proposed by the government are almost twice as likely to be approved by voters than measures proposed by initiative:[81]

> . . . it is plain that measures proposed by legislatures or constitutional conventions are approved by the voters at a rate almost double that for measures proposed by initiative petitions . . . Evidently, then, the voters in most states are far more likely to think well of a proposed new law or constitutional amendment if it has previously been considered and approved by their elected representatives than if it is solely the creature of an unofficial pressure group, whether it be regarded as a "special interest" or "public interest" group. This is entirely consonant with the view that direct legislation is not an alternative to representative democracy but, at most, a useful supplement to and check on its basic machinery.

Accordingly, once again it would appear that the direct voting procedures available in the states have not entirely freed the electorate from the influence or control of the political elites.

It should also be noted that the availability of direct voting procedures at the state level does not provide the electorate with unrestricted access to the lawmaking system. On the contrary, the role of the public in this process remains subject to many of the same restrictions which are imposed on the people's elected representatives in their lawmaking roles. For example, as one might expect, laws which are placed into effect through referendum or initiative procedures must be constitutionally valid, both with respect to the state constitution and the United States Constitution. Accordingly, citizens of a given state can only enact legislation which properly falls within the jurisdiction of the state legislature. Further, legislation initiated or ratified by the electorate must comply with the principles set out in both the state and federal constitutions and the direct voting procedures set out in the state constitutions or statutes must be followed. The job of ensuring that all of these requirements are met has typically fallen on the American courts, making the judicial system the primary policing mechanism of direct democracy at the state level.

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[80] Lee, *ibid.*, at 51.

[81] Ranney, *supra* n. 72, at 81-82.

To date, the major constitutional challenge to the direct democracy process which has been brought before the courts in various states concerns the allegation that direct voting legislation violates the 'Guarantee Clause' of the American constitution. This clause indicates that "The United States shall guarantee to every State in this Union a Republican Form of government. . ."[82] Challengers of direct voting legislation have argued that a republican form of government contemplates lawmaking only through elected representatives and precludes citizens from enacting their own laws. Although some court decisions have been conflicting on this point, the general trend of the state court decisions and the approach taken by the United States Supreme Court has been to reject the argument that direct democracy conflicts with the Guarantee Clause in principle.[83]

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[82] *Constitution of the United States of America*, 1789, Article IV, Section 4.

Other constitutional challenges to direct democracy provisions have been brought on the basis that the procedures for placing initiatives or referendums on the ballot violate the guarantee of due process set out in the Fourteenth Amendment and that the initiative and referendum procedures violate the equal protection provision of the American constitution because legislation arising from a direct vote may override minority interests.[84] Once again, although the courts have sometimes found in favour of these arguments, generally the approach taken by the courts in these matters has not obstructed direct voting in principle at the state level.

V. OTHER WESTERN EUROPEAN COUNTRIES

A. Sweden[85]

As a unitary state with all legislation being implemented on a national level, Sweden has not had to deal with the complexities of federalism in attempting to incorporate direct voting procedures into its political process. Still, Sweden's implementation of direct voting measures has not been without difficulty, as it has struggled to balance its growing recognition of the merits of direct democracy with its history of representative government. The limited extent to which direct democracy has prevailed over the representative government systems in Sweden has led the country's direct voting efforts to be characterized as "half-hearted".[86]

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[83] For a further and more detailed discussion of this constitutional challenge, see: J. F. Zimmerman, *Participatory Democracy: Populism Revived* (1986), at 78-79; Suksi, supra n. 2, at 79-82; P. F. Gunn, "Initiatives and Referendums: Direct Democracy and Minority Interests" (1981) 22 *Urban Law Annual* 135; C. L. Fountaine,"Lousy Lawmaking" (March 1988) 61 *Southern California Law Journal* 733 at 772-776.

[84] For a further discussion on this point, see Gunn, *ibid.*, at 140-141.

[85] Except where otherwise indicated, information for this section has been summaried from Suksi, *supra* n. 2, at 212-231.

Although the idea of direct voting was first seriously considered in Sweden in the late 1800's and early 1900's as a popular corrective on the Riksdag (the Swedish Parliament), implementation of this idea did not take place until 1922. At that time, largely as a result of the influence of the progressive political movement and Temperance activists, the Swedish Constitution was amended to permit a consultative direct vote to be held on any issue deemed by the King and Parliament to be of sufficient importance to merit ascertaining the opinion of the public. No further advances were made in the realm of direct democracy until well after the Second World War when a three term Social Democrat majority government caused demands for more influence on national decision-making by those without direct access to the process. While various suggestions for more advanced direct voting measures were proposed throughout the 1950's and 1960's, no further measures were adopted until 1974 when the constitution was amended to provide for consultative direct votes for constitutional amendments. In 1979 the constitution was further amended to permit binding direct votes to be held on constitutional amendments relating to lawmaking powers and international agreements. This amendment provides for a constitutional referendum to be held where one-tenth of the members of the Riksdag propose that a pending constitutional amendment be put to a referendum and this proposal is supported by one-third of the members of the Riksdag. Upon a measure being taken to a direct vote, the measure is considered rejected if a majority of the votes cast against the proposal exceeds fifty percent of the valid votes cast in the simultaneous general election.

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[86] *Ibid*. at 212.

Notwithstanding the above noted constitutional amendments which have been made to increase the role of direct voting in Sweden, as of 1993, only the consultative direct voting procedures had been used in Sweden. Specifically, up to 1993, non-binding direct votes had been held on the policy matters of prohibition (1922), right hand driving (1955), pensions (1957) and nuclear energy (1980). The non-binding nature of these votes is emphasized by the fact that, despite results showing 82.9 percent of the voters against right hand traffic in 1955, in 1967 the Riksdag introduced right hand traffic. Thus, while consultative direct votes have certainly been employed in Sweden, the use of these votes does not necessarily reflect an overall commitment by the government to solicit or to follow the voice of the people:[87]

> . . as the right-hand traffic issue shows, there are situations where the political

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[87] *Ibid.* at 228.

memory of representative institutions is fuzzy and flexible enough to facilitate a re-evaluation of the current position without involving the people.

B. Finland[88]

Since achieving national independence in 1917, Finland has been struggling with the implementation of direct democracy into its republican, federal political system. Despite periodic pressure for direct voting provisions to be incorporated into the constitution, this reform was not achieved until 1987 when the Finnish constitution was amended to provide an explicit constitutional basis for consultative direct votes as of July 1, 1987. This amendment authorizes a non-binding national vote to be organized through an Act of Parliament. Accordingly, currently the major obstacle to holding a national direct vote in Finland is gaining the support of enough members of Parliament to pass a statute providing for the vote in question.

Surprisingly, while formal constitutional authorization for direct voting did not take place in Finland until 1987, to date the only national direct vote held in this country took place on December 29 and 30, 1931 on the issue of Prohibition. As in many other jurisdictions, the necessity for this direct vote arose because of pressure from interest groups and the government's concern that Prohibition legislation was being ignored to such an extent that respect for legal order was being threatened. Upon the recommendation of the Committee on the Constitution then operating in Finland, the consultative vote on Prohibition was conducted pursuant to ordinary legislation rather than constitutional authorization. The participation of the electorate in this vote was low (44.3 percent), but the overwhelming majority in favour of abolishing Prohibition (70.5 percent) led to the successful repeal of the Prohibition legislation. Accordingly, in this case the consultative direct vote "showed its use-value for resolving a problem and for clearing the issue from the political agenda."[89]

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[88] Except where otherwise indicated, information for this section has been summarized from Suksi, *ibid.*, at 212-231.

Despite Finland's apparent success in holding a consultative national direct vote in 1931 and the incorporation of direct voting procedures into the constitution in 1987, it is not expected that the use of direct voting in Finland will increase in the foreseeable future:[90]

> If one would dare to predict the future, it might perhaps be possible to say that the referendum frequency in Finland will remain at the same level after the incorporation of the provision as before the constitutional amendment. Thus the amendment should mainly be viewed as a codifiction of 'practice': it was a cosmetic operation or a face lift which did not purport to alter the decision-making mechanisms.

Still, it is recognized that, at the very least, the inclusion of direct voting mechanisms in the constitution may educate the people as to the availability of such votes as legislative tools.[91]

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[89] *Ibid.*, at 223.

[90] *Ibid.* at 225.

C. Italy

Despite its often tumultuous internal political situation, Italy remains committed to ensuring the effective participation of its citizens in the country's political and legislative processes. After World War II, a national referendum on political reform was held in Italy, resulting in the country changing from a monarchical to a republican form of government in 1948. The new constitution, which established a bicameral national Parliament and fifteen regional government councils, included several direct democracy provisions. Currently, the constitution requires constitutional amendments to be put to a national vote if such a vote is requested within three months of the publication of the amendment by 500,000 voters, five regional councils or one fifth of the members of either chamber of Parliament. Further, upon the petition of 500,000 members of the electorate, voters may present draft legislation to Parliament. The only direct democracy provision which has seen significant use, however, is found in Article 75 of the *Constitution of the Republic of Italy*. This provision requires a national direct vote to be held to repeal a law (other than laws dealing with fiscal matters, treaties, or amnesties) upon the demand of 500,000 voters or five regional councils. Where such a vote is held, the law is repealed upon the vote of a simple majority.[92]

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[91] *Ibid.*

[92] These provisions are as summarized from Dunsmuir, *supra* n. 1, at 13-14.

Up to 1986, nine referendums had been held under Article 75 of the Italian constitution. Only the first of these referendums, held in 1974 on the issue of repealing divorce legislation, was successful.[93] This low success rate has led to the characterization of this type of abrogative referendum as one of the "least disruptive" and "seldom destabilizing" forms of direct voting.[94]

D. **Ireland**[95]

On the surface, Ireland appears to be a "referendum friendly" country because of its efforts to include direct democracy provisions as part of its national lawmaking processes. Even prior to 1937, when Ireland achieved full independence from Great Britain, direct voting provisions had been included in many of Ireland's constitutional documents. The country's approval of direct democracy measures was further demonstrated in 1937 when a referendum was held under the *Plebiscite (Draft Constitution) Act* to obtain the public's approval of Ireland's new constitution.

Articles 46 and 47 of the *Constitution of Ireland, 1937* provide that constitutional amendments require the approval of both houses of the Oireachtas (Parliament) and the support of a majority of the votes cast in a national referendum. Additionally, Articles 27 and 47(2) of this document provide for referendums to be held on ordinary legislation where the idea of holding such a referendum is supported by one third of the members of the Dail Eireann (the elected House of Parliament) and a majority of the Seanad Eireann (the appointed House of Parliament) and the President decides that the matter is of sufficient national importance to submit to a referendum. Where these requirements are met and a referendum is held, the public can vote down the legislation by a simple majority vote, where this majority constitutes no less than one third of the voters on the register.[96]

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[93] *Ibid.*, at 29.

[94] *Ibid.* at 30.

[95] Except as otherwise noted, the information in this section is summarized from M. Suksi, *supra* n. 2, at 183-210.

Up to 1993, there have been sixteen constitutional referendums held in Ireland under the authority of the 1937 amendment provisions, with 11 of these votes resulting in the proposed change being successfully adopted. For the most part, the proposed amendments have involved matters of political and government organization (including voting systems and membership in the European Community), with only a few amendments concerning moral or social issues (such as divorce and abortion).[97] On the other hand, the legislative referendum provisions of the 1937 constitution have never been used, arguably because the requirements for calling such a vote are so strict that "a recourse to such a referendum would be politically feasible only in very exceptional situations unlikely to arise under a majority government."[98]

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[96] Note that, because these votes are binding, they are properly referred to in the constitution as "referendums".

[97] For a more detailed discussion of the content of the proposed constitutional amendments which have been voted on, see Suksi, *supra* n. 2, at 195-197.

The fact that direct votes in Ireland can only be held with the support of Parliament has led to speculation about the extent to which Ireland is really committed to the values of direct democracy. In this regard, some analysts suggest that, by linking direct voting so closely with the power of Parliament, the Irish system pays lip service to the idea of direct democracy without showing any real commitment to the empowerment of the people:[99]

> The referendum was initially introduced into the Irish Constitution to provide legitimacy both for the Constitution and for any future constitutional amendments. At the same time, while Irish political leaders asserted that ultimately their power came from the people, there was a tendency to invoke the people's name as justification for their actions and to condemn their opponents as anti-democratic. There is a contradition between popular and parliamentary sovereignty. Either Parliament or the people are supreme; they cannot both be the final authority. Most constitutions pay lip service to the people, few as clearly as does the Irish Constitution. The tension between the authority of Parliament and that of the people in the working out of the Irish system is a result of the inclusion of the conventions of British cabinet government and parliamentary sovereignty combined with the more radical concepts of sovereignty of the people.

While recognizing the fact that the Irish system leaves the majority of legislative power with the elected representatives, other analysts have been less severe in their assessment of the country's commitment to direct democracy:[100]

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[98] *Ibid.* at 204.

[99] G. MacMillan, "The Referendum, the Courts and Representative Democracy in Ireland" (1992) XL *Political Studies* 67 at 77.

[100] Suksi, *supra* n. 2, at 210.

> By and large, it can be said that the use of the referendum in [Ireland] creates a viable combination of direct and representative democracy without there being any need to regard the two forms of democracy as opposites. On the other hand, it is also obvious that the number of hurdles created by the constitution for the holding of referendums is a relevant factor in the determination of the practical use of referendums: the more hurdles, the fewer referendums. Despite the referendum-friendly image of [Ireland], [it is] still deeply rooted in representative forms of decision-making.

In any case, recognizing that Ireland's elected representatives remain the primary source of lawmaking power in the country, the existence of direct voting provisions in the country's constitution do provide the people with a greater opportunity to participate in national decision-making than might otherwise be the case. Further, under the present system, the Irish courts and interest groups can exert significant pressure on the government to introduce certain constitutional amendments or legislative reforms which should be voted on by the people.[101]

VI. CONCLUSION: LESSONS FROM THE INTERNATIONAL EXPERIENCE

The primary point of the above discussion is that, to varying degrees and in various forms, direct voting has recently been employed as a significant lawmaking tool in a number of western democracies. Although the countries considered above represent a number of different political systems and structures, with the exception of the United States each of these countries has utilized some form of direct democracy mechanism at the national level within the last century. At the very least, this fact demonstrates that direct voting mechanisms can be used in concert with representative government systems as a means of giving the public greater influence on certain matters of national concern without changing the fundamental representative nature of the lawmaking systems involved. In fact, each of the countries discussed arguably stands as proof that direct democracy can act as a useful complement to a representative government system.

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[101] For a more detailed discussion on how the courts and interest groups can exert pressure on the Irish government for direct votes, see MacMillan, *supra* n. 99, 67.

Despite the use of direct voting mechanisms in each of the above noted countries, however, no single reason for employing these mechanisms is apparent. Unfortunately, other than Switzerland, it does not appear that any of the countries considered use direct voting procedures because of a particular devotion to democratic principles. Instead, it seems that national direct votes are usually held for pragmatic, political reasons, particular to the issue in question. As one commentator notes:[102]

> A look at the list of referendums offers a powerful deterrent to easy generalizations about why they have been held. Each seems to have a special history, rooted in an individual national tradition. The reasons for each referendum, its treatment by politicians and by voters, and its consequences fail to fit any clear universal pattern.

Still, it has been suggested that the most recurrent reasons for the use of direct voting include constitutional necessity (where a nation's constitution expressly permits constitutional or legislative change only through a direct vote), legitimization of a government policy (where the government seeks popular authorization of one of its policies), and the transfer of decision making responsibility (where a government is itself divided on an issue or wants to avoid responsibility for a decision which might be unpopular with a section of the public).[103] Of these three explanations, it is only in the first that we see referendums used "as an expression of some kind of a fundamental sovereignty vested in the people"[104] rather than largely as a political tool. The more that a country's decision to hold a referendum rests with the government rather than being a right or an option of the people, the more pragmatic and the less ideological is that country's commitment to direct democracy.[105]

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[102] Butler & Ranney, ed., *supra* n. 1, at 19.

Looking at the countries considered in this chapter, then, Switzerland appears to exhibit the greatest national commitment to fundamental democratic principles because its constitution provides for binding referendums on constitutional amendments and some legislation and because, in certain circumstances, its constitution permits the people to initiate direct votes on ordinary legislation. Italy nears Switzerland in its democratic commitment because its constitution requires direct votes for constitutional change and permits the people, at their initiative, to abrogate ordinary legislation through a direct vote. In contrast, Australia, Ireland and Sweden appear to somewhat less committed to pure democratic principles because their constitutions require direct votes to be held only on constitutional amendments. From a national perspective, the United Kingdom, the United States and Finland arguably demonstrate the least devotion to direct democracy because they have no constitutional requirements for direct votes to be held and consequently they leave the decision to hold such votes entirely in the hands of the government.

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[103] *Ibid.* at 18.

[104] Suksi, *supra* n. 2, at 273.

[105] In this regard, it is interesting to note that, according to Suksi, *ibid.*, at 145, not a single national constitution in the world creates a mandatory legislative referendum, which would grant the people the greatest possible degree of legislative sovereignty.

Regardless of the extent to which each of the countries discussed employ direct voting mechanisms and for what reasons, it is clear from the experiences of these countries that a number of potentially problematic issues may arise where a nation seeks to incorporate direct democracy provisions into an otherwise representative political system. First, in a political system based on the Westminster Parliamentary model, difficulties may arise in ensuring that direct voting provisions are meaningful without interfering with the principles of Parliamentary supremacy or party solidarity. The experience of the United Kingdom with the EEC referendum is encouraging in this regard because it shows that, with the relaxation of some general Parliamentary rules, a direct vote can be effectively held in a Parliamentary system without serious repercussions for the system itself. Second, where the political system in question is a federal one, direct voting can lead to national unity crisis because of the potentially divergent interests of the nation as a whole and its political regions. Accordingly, direct voting provisions in a federal state must be structured to balance the interests of the nation with the interests of the regions within the nation. As suggested by the Australian experience, however, this balancing of interests may come at the expense of significant legislative or constitutional change. Finally, as illustrated by virtually all of the countries discussed above, in modern political systems the legitimacy of direct votes can be adversely effected and influenced by partisanship, interest groups, and voter apathy. While these influences may be at least to some degree inevitable, in structuring any system of direct democracy care should be taken to minimize their effects and to maximize the effectiveness of the greatest number of voters possible.

CHAPTER THREE

THE HISTORY OF DIRECT VOTING IN CANADA

In every circumstance where reform is proposed, before serious consideration can be given to how and why change should be undertaken, some time must be spent analyzing the current situation and the significant events which have led to the status quo. With this approach in mind, the purpose of this Chapter is to briefly review the history of direct voting in Canada and the current state of Canadian law in this area. This discussion will provide a basis for later Chapters wherein we will examine the future prospects for direct voting in Canada. It is also hoped that this historical review will provide some understanding of the role which national referendums and plebiscites have played in Canada's history, what circumstances have led to their use, what concerns or difficulties have been associated with their use, what effect their use has had on the formulation of Canadian legislation and government policies, and what limitations, if any, have inhibited their use.

Only three national direct votes have taken place in Canada since 1867: the vote on prohibition in 1898, the vote on conscription in 1942, and the vote on the Charlottetown Accord in 1992. Notwithstanding this limited use of the direct vote on a national scale, however, the idea of holding a national referendum or plebiscite has been raised by federal government members on a number of occasions with respect to a variety of issues. Additionally, numerous referendums and plebiscites have been held at the provincial and local government levels and several court cases have been decided with respect to the use of direct votes in Canada. This chapter, then, will review the history of direct voting in Canada in each of these areas,[1] concluding with a summary of the current state of the law as it pertains to the conduct of national referendums or plebiscites in this country.

I. NATIONAL DIRECT VOTES HELD TO DATE

A. The Vote on Prohibition

By the late 19th century, prohibition had become a controversial issue in Canada. Increasing alcohol consumption had sparked ongoing disagreement between those citizens concerned with the moral, religious and social implications of alcohol use and others who advocated individual freedom and capitalism. In 1878, under considerable pressure from prohibitionist forces, the Canadian Government enacted the *Canada Temperance Act*[2] which prohibited the manufacture and sale of alcohol on a local level. Specifically, the Act provided that, upon a petition brought by one quarter of the electorate in any city or county, a local referendum on prohibition must be held. A majority vote in favour of temperance would bind the local government to enact total prohibition within the locality, revocable only after three years and then only upon a new referendum being held and prohibition defeated.

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[1] Since the focus of this paper is on national direct voting, this Chapter will consider in detail Canada's experience with nation-wide referendums and plebiscites. Due to limitations of time and space, however, this Chapter will necessarily provide a much more cursory review of direct voting at the provincial and local government levels.

[2] S.C. 1878, c.16.

Under this scheme, prohibition was established in many localities throughout the country. Despite these local prohibition measures and the establishment of a federal Royal Commission to investigate the effects of liquor traffic and prohibition in Canada,[3] temperance supporters continued to lobby legislators for further prohibition measures. Finding the issue too controversial to deal with in the legislatures alone, several provincial governments held provincial plebiscites on prohibition and this, in turn, encouraged prohibitionists to seek a national direct vote on the issue.[4]

As the federal opposition party in the early 1890's, the Liberal Party was pressured by temperance lobbyists to stake out a position in favour of the prohibition movement. Sir Wilfred Laurier, then the Liberal Party leader, refused to offer a conclusive position on national prohibition but indicated strong support for a nationwide plebiscite on the issue. Accordingly, at its 1893 convention, the Liberal Party passed a resolution stating that:[5]

> . . . whereas public attention is at present much directed to the consideration of the admittedly great evils of intemperance it is desirable that the mind of the people should be clearly ascertained on the question of prohibition by means of a Dominion Plebiscite.

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[3] R.E. Spence, *Prohibition in Canada* (1919) at 231.

[4] J.P. Boyer, *Direct Democracy in Canada: The History and Future of Referendums* (1992) at 17.

[5] Spence, *supra* n. 3, at 233.

This resolution formed the basis of much of the Liberal Party's campaign platform in the federal election of 1896 and, not surprisingly, upon winning a majority, the new Liberal Government was under considerable political pressure to see this promise through. Accordingly, in his throne speech of 1897, Laurier promised to hold a national plebiscite on the question of prohibition.

Before a national plebiscite on prohibition could be held, however, Laurier had to overcome a serious practical problem: at that time, Canada had no federal legislation enabling the government to hold a national plebiscite and, accordingly, such legislation had to be passed before any vote could be held. In this regard, Laurier introduced the *Prohibition Plebiscite Act, 1898*[6] into the House of Commons. Rather than providing the government with a general power to hold a plebiscite on any issue, this Act was more limited in scope, only enabling the government to hold a plebiscite on the specific question of prohibition, following which the Act would be considered spent. This statutory linkage of plebiscite procedure with the prohibition issue led to the "inevitable result that the prohibition issue itself became entangled in the procedural aspects for conducting the vote."[7]

During the Parliamentary debates on the *Prohibition Plebiscite Act*, several questions were raised, ranging from ideological concerns respecting the appropriateness of holding a plebiscite to practical considerations regarding the form which the plebiscite should take. The issues raised included: whether the holding of a plebiscite was "Un-British" and not in keeping with the Parliamentary system of government established in Canada; whether the government should be bound by the results of the vote and, if so, what percentage of the vote would constitute a binding decision; what the response to the plebiscite results should be; what the political implications would be if Quebecers voted differently than the rest of the country; and whether the vote should be held on the question of prohibition in principal or on draft temperance legislation.[8]

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[6] S.C. 1898, 61 Victoria, c. 15.

[7] Boyer, *supra* n. 4, at 18.

Ultimately, after considerable debate on these questions, the *Prohibition Plebiscite Act* was passed. This statute provided that a national direct vote be held on the general question: "Are you in favour of passing an Act prohibiting the importation, manufacture or sale of spirits, wine, ale, cider and all other alcoholic liquors for use as a beverage?"[9] The Act was passed without any obligation on the government to abide by the results of the vote and without any definite indication by the government as to what percentage of the vote would stir the government to action or what the government's response would be if Quebecers did not align themselves with the rest of the country. In response to these latter two issues, Laurier would say only that, to be effective, a prohibition law

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[8] For a more detailed discussion of these arguments as they were raised by political figures of the time, see Boyer, *supra* n. 4 at 18-20 and Spence, *supra* n. 3, at 241-242.

[9] *Supra* n. 6, s. 3.

"must be based upon the popular will, absolutely and unmistakably expressed."[10]

As a result of the passage of the *Prohibition Plebiscite Act*, Canada's first national plebiscite was held on September 29, 1898 with 44 percent of eligible voters (which did not include women) casting a ballot. The voting results were 278,487 in favour of prohibition and 264,571 against, with the measure passing in all provinces except Quebec where it was rejected by 122,614 to 25,582.[11]

In Laurier's opinion, the results of the plebiscite did not give his government the 'absolute and unmistakably clear' mandate required to institute national prohibition and, accordingly, the government did not take any steps to implement prohibition following the plebiscite. Laurier justified his refusal to enact temperance legislation by pointing to the fact that only 23 percent of the total electorate (rather than those who actually voted) had indicated their support for prohibition.[12] Laurier's position in this regard has led at least one historian to conclude that the government response to the 1898 plebiscite was to defer to those who had chosen not to express an opinion at all rather than to heed the opinion of those who had actually voted:[13]

> The government based its refusal to grant prohibition on the ground of the

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[10] Spence, *supra* n. 3, at 242.

[11] Boyer, *supra* n. 4, at 25.

[12] Spence, *supra* n. 3, at 251.

[13] *Ibid*. at 252.

> smallness of the prohibition vote. They had promised to obey the mandate of the people; now they declared they must obey the mandate of those who had given no mandate. The opinion of the people was to be respected; that is to say the opinion of those who had not expressed their opinion.

In any event, however, Laurier's apparent reliance on the absence of a mandate from those who chose not to participate in the plebiscite enabled his government to avoid acting on the results of a plebiscite which indicated only a marginal national preference for prohibition and which showed the country to be clearly divided along French/English lines on this issue. By revealing these marked divisions in the country, the plebiscite demonstrated that, at least from a political point of view, the prohibition issue was best dealt with on a local level.[14]

In light of the federal government's refusal to enact national prohibition legislation, many provinces continued to legislate on this issue and to hold their own plebiscites on the matter well into the 1920's. Response to the prohibition issue at the provincial level was so strong that the importance of the *Canada Temperance Act* ultimately became secondary to provincial legislation.[15] The federal government did not take any further action on the prohibition question until 1916 when, in the midst of World War I, Parliament passed a law preventing the interprovincial shipment of alcohol with respect to provinces where provincial prohibition laws were in place (thus once again effectively leaving the final decision to the provinces). Then, in 1917, in order to cope with the war effort, the Canadian government passed an Order in Council invoking nation-wide prohibition until the end of the war.[16] In 1990, the *Canada Temperance Act* was repealed as part of an omnibus legislative housekeeping bill.[17]

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[14] Boyer, *supra* n. 4, at 26.

[15] *Ibid*.

B. The Vote on Conscription

Canada's entry into both the first and second World Wars caused dissension within the country as to what role Canada should play in the war efforts. In particular, as neither war was seen as a direct threat to Canadian soil, controversy arose in 1917 and again in the 1940's as to whether Canadians should be conscripted for overseas service. Disagreement on this point was particularly evident between English-speaking and French-speaking Canadians.

At the outbreak of hostilities leading to World War I, Prime Minister Robert Borden's Conservative government was on the verge of seeking a national mandate to fight the war, however, at the last minute the government changed its course and brought Canada into the war without taking the issue directly to the people. In 1917, with the war still raging and Canadian troops declining in numbers, Borden introduced a military service bill into Parliament to lay the groundwork for conscription.[18] Along with several French newpapers and political leaders, Opposition Leader Sir Wilfred Laurier responded to this bill's introduction by arguing that a referendum should be held to obtain a popular mandate for conscription before any further conscription legislation was enacted. Laurier's view was that the governing rule in Canada prohibited compulsory military conscription other than to fight an invasion of this country and that a specific mandate from the people was therefore required to change this accepted course.[19] Despite Laurier's best advocacy and his obvious concern for national unity, his motion for a referendum was defeated and the Conservative government ultimately imposed conscription on the Canadian public. Enforcement of conscription proved difficult, however, particularly in Quebec, where riots erupted which the government finally quelled through the use of military force.[20]

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[16] Spence, *supra* n. 3, at 481-483 and 487-489.

[17] Boyer, *supra* n. 4, at 26-27.

Conscription for overseas service again became a controversial issue in Canada with the nation's declaration of war against Germany on September 10, 1939. Accordingly, the conscription question became an important element in the federal election campaign of 1940. On March 26, 1940, Prime Minister Mackenzie-King's Liberal government was re-elected partly as a result of King's campaign promise of "no conscription for overseas service."[21]

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[18] *Ibid.* at 31.

[19] *Ibid.*

[20] *Ibid.* at 34.

In the early 1940's, several events put pressure on the federal government to change its position on overseas conscription. Primary among these events was the continuing brutal nature of the war and the repeated requests from the Canadian army for a program to increase its numbers overseas. Additionally, in November 1941, Arthur Meighen became leader of the national Conservative Party, calling for conscription as part of his leadership campaign. Meighen's position on the conscription issue was particularly significant in that it apparently stirred a great deal of pro-conscription sentiment among English-speaking Canadians:[22]

> Meighen's return let loose the pro-conscriptionists. All the restraint that had marked the press and people of English Canada fell away, and over the course of the next three months the language and passion escalated.

The pressure of the pro-conscriptionists manifested itself in newspaper ads taken out by organizations favouring conscription and in the endorsement of conscription by several provinces or their leaders.[23] Despite the publication of these views, however, the overall perspective of the nation on the conscription question was difficult to assess. Popular opinion polls revealed conflicting results regarding Canadians' satisfaction with the war effort and their views on conscription such that there appeared to be "a public opinion in the country to suit every politician's needs."[24]

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[21] *Ibid.* at 36.

[22] J.L. Granatstein & J.M. Hitsman, *Broken Promises: A History of Conscription in Canada* (1977) at 162.

[23] *Ibid.*

This controversy over conscription came at a bad time for King, escalating less than one month before the scheduled Cabinet debate on the 1942-1943 war program and just before the bombing of Pearl Harbour. King did not appear to have any ideological or moral problems with the notion of conscription itself. King did, however, have a political problem invoking conscription without the support of the electorate, particularly in light of his government's election promises and the country's memory of the 1917 conscription crisis. Accordingly, in 1941 King began to seriously consider options for obtaining a mandate for conscription from the electorate.

Among the options considered by King were a general election, a referendum or a plebiscite. After some consideration of these alternatives, King rejected the idea of a general election because he considered an election too disruptive and dangerous during wartime and because he felt an election might confuse the conscription issue with other election issues. He also rejected the notion of holding a referendum because he felt that the results of a referendum would bind the government to impose conscription even if unnecessary and would therefore inappropriately free the government from all responsibility in making this decision. By contrast, rather than shirking the government's responsibility, King saw a plebiscite as a means of enabling the government to accept full responsibility for any conscription decisions.[25] Additionally, the holding of a plebiscite had several advantages for King in that it might delay the matter until the public perception became clearer, decrease the ability of the Conservatives to raise conscription as an opposition issue in the House, and prevent division within Cabinet. Accordingly, in his Throne Speech on January 23, 1942, King formally announced his intention to hold a national plebiscite on conscription.

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[24] *Ibid*. at 163.

In 1942, Canada still did not have a federal statute in place which authorized a national plebiscite. Enabling legislation had to be enacted before a national vote on conscription could take place. Accordingly, King introduced the *Dominion Plebiscite Act, 1942.*[26] Like the 1898 Act, this statute was topic specific and provided only for the holding of a plebiscite on the conscription issue, after which the Act would no longer have any effect. Also reminiscent of the *Prohibition Plebiscite Act* were many of the questions raised during Parliament's consideration of the 1942 Act, including whether a plebiscite was a negation of responsible government and whether the plebiscite was contrary to the principles of Parliamentary government.[27] King's main response to these arguments was an ethical one, based on the notion that, whatever the legal considerations, his government did not have the moral authority to proceed with conscription without a plebiscite:[28]

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[25] Boyer, *supra* n. 4, at 37-38.

[26] S.C. 1942-43, 6 George VI, c.1.

[27] Boyer, *supra* n. 4 at 38.

> There is a distinction to be made between the legal powers which the government has and the moral authority which it possesses. With respect to the legal power, there can be no question whatever that this Parliament has full power to do whatever it may decide to do with respect to the management of matters pertaining to the war. The one limitation which exists on that power so far as this Parliament is concerned is not a legal limitation but a moral obligation . . . To say that the Parliament of Canada, which derives its powers from the people, after a solemn pledge has been given to the people on a matter which is of deep concern to them, is released from this pledge the moment the people have elected it, is simply for Parliament itself to create a precedent which would be subversive of parliamentary institutions.

King's arguments were persuasive and the *Dominion Plebiscite Act, 1942* was ultimately passed, providing for a plebiscite to be held on the question: "Are you in favour of releasing the government from any obligation arising out of any past commitments restricting the methods of raising men for military service?"[29]

Ironically, although the government's decision to hold a plebiscite was made to obtain the views of all Canadians, the suggestion of a plebiscite was met with a particularly strong negative response in Quebec. The Quebec campaign for a "Non" vote in the plebiscite was organized under an umbrella organization known as La Ligue pour la Defense du Canada, which resisted the notion of conscription on the basis of two main arguments: first, that the government must intend to impose conscription for overseas service or it would not be asking to be released from its earlier promise and second, that the government was betraying French-speaking Canadians by now asking the entire country's permission to release the government from a promise which was made primarily to French-Canadians.[30]

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[28] *House of Commons Debates*, February 25, 1942, at 823.

[29] *Supra* n. 26, s. 3.

The plebiscite vote took place on April 27, 1942, resulting in 2.95 million "yes" votes and 1.65 million "no" votes. Once again, in each of the English-speaking provinces, nearly 70 percent of the voters favored the measure, while in Quebec the proposition was defeated by 78.9 percent of voters. Constituencies outside of Quebec with strong French or ethnic populations also showed a majority vote against the question.[31]

The division of the voting results along French / English lines presented the government with an increasingly familiar problem: how to resolve the issue so as to give effect to the decision of the majority of Canadians without alienating Quebec. King's answer to this dilemma was to interpret the results, not as a vote for conscription (as suggested by some of his cabinet ministers), but as a vote of confidence in the government to enforce conscription when and if the government deemed it necessary. King argued that the plebiscite had given his government a moral right to enforce conscription but when to exercise this right remained an open question.[32]

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[30] Granatstein & Hitsman, *supra* n. 22, at 168.

[31] Boyer, *supra* n. 4, at 41-42.

[32] J.L. Granatstein, *Canada's War: The Politics of the Mackenzie King Government, 1939-1945* (1975) at 229.

King's practical response to the plebiscite was to ease some of the restrictions on service within North America, but to otherwise abide by his earlier promise not to impose conscription unless and until there were insufficient reinforcements available to maintain the army overseas. Ultimately, this position permitted King to avoid imposing conscription until 1944. Accordingly, it has been suggested that, by revealing the divisions in the country with respect to conscription, the 1942 plebiscite enabled King to maintain national unity and prevent a crisis similar to that experienced by the country in 1917:[33]

> While some critics of direct democracy claim that the 1942 vote was divisive, it would be more accurate to say it reflected the division which already existed in Canada. It actually helped King keep the country together during the manpower crisis (with the spectre of the World War I conscription crisis in the background) because it unequivocally demonstrated how Canadian views differed.
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> As a result, the King government successfully delayed introducing conscription for overseas service for two more years until 1944. The war effort continued successfully. Soldiers who had already been conscripted for home defence were dispatched for England in 1944 when overseas conscription took effect. The plebiscite results averted a crisis similar to the ugly one of 1917 and helped King buy time to diffuse the issue.

C. The Vote on the Charlottetown Accord

Canada's third nation-wide direct vote arose as part of the country's long struggle for constitutional reform. This vote was unique in Canadian experience because it concerned the fundamental structure of the country rather than a transient issue of government policy. Further, this vote marked the first time in Canadian history that the Canadian people acted as the official and final decision-makers on constitutional change.

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[33] Boyer, *supra* n. 4, at 42.

From the time of Confederation right up until the plebiscite on the Charlottetown Accord in 1992, numerous attempts had been made to reform the Canadian constitution.[34] In the early part of this century, as Canada moved increasingly toward total independence from Great Britain, the call for constitutional reform arose as part of the search for an Amending Formula which would permit the Canadian constitution to be amended without the assistance of the British Parliament. This reform was finally achieved in 1982 when, under the leadership of Prime Minister Pierre Elliott Trudeau, the constitution was successfully patriated, along with a newly entrenched Amending Formula and a Charter of Individual Rights and Freedoms. The consent of the provinces for patriation of the constitution was not easily obtained, however, and this reform took place over the objections of Quebec. Essentially, Quebec's objections were based on the argument that the reformed constitution did not make adequate provisions for the protection and recognition of Quebec's distinctiveness as the only French province in the country. Accordingly, although Quebec was legally bound by the *Constitution Act, 1982*[35], it perceived itself as separated from the nation's "constitutional family."

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[34] For a useful review of the history of constitutional reform in Canada, see P.H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (1993).

[35] As enacted by *Canada Act 1982* (U.K.), c. 11.

In 1987, following considerable discussion, debate and negotiation, Prime Minister Brian Mulroney and the ten provincial premiers signed the Meech Lake Accord,[36] a document designed primarily to satisfy Quebec's constitutional demands. Before the Meech Lake Accord could become effective, however, it had to be adopted in accordance with the Amending Formula set out in the *Constitution Act, 1982*. Specifically, the Accord had to be ratified by the House of Commons and each of the provincial legislatures within 3 years of being signed.[37] The legislatures of Manitoba and Newfoundland failed to ratify the Accord and, consequently, in October 1990, the Meech Lake Accord was rendered null and void. Hence, as the country entered the last decade of the twentieth century, Quebec's position in the nation remained a clouded issue. Once again, further discussions of constitutional reform were necessary.

Following the failure of the Meech Lake Accord, the federal government scrambled to understand why constitutional reform was proving to be such a difficult task. To this end, the federal government established the Beaudoin-Edwards Committee (a Special Joint Committee of the Senate and the House of Commons) to study the existing process of constitutional amendment. One of the main conclusions of this committee was that the process of constitutional reform to date had been too elitist, being effected almost exclusively by the first ministers without any meaningful involvement of the Canadian people. To resolve this problem, the committee recommended stronger public participation in constitutional reform.[38] After examining several options with respect to forms this public participation might take, the committee ultimately concluded that a referendum would be the preferred form of public participation. Since Canada still did not have any standing legislation permitting the federal government to hold a referendum, the committee recommended that:[39]

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[36] *The Meech Lake Accord*, June 1987.

[37] *Supra* n. 35, s. 39(2).

> a federal law be enacted to enable the federal government, at its discretion, to hold a consultative referendum on a constitutional proposal, either to confirm the existence of a national consensus or to facilitate the adoption of the required amending resolutions. The referendum should require a national majority and a majority in each of the four regions (Atlantic, Quebec, Ontario, and the West).
>
> The territories would participate in the referendum, after having selected the region in which they would be included for the purpose of calculating regional majorities.

In arriving at this recommendation, the committee discussed a number of common concerns raised with respect to the use of direct votes, many of which echoed the concerns expressed during the referendum debates of 1898 and 1942. Some of the concerns noted included: the possibility of voting results accentuating divisions of opinion within the country; the notion that the use of a direct vote would constitute an abdication of responsibility by the elected representatives; the possibility that a direct vote might result in a "dictatorship of the majority", depriving minority groups of their rights; and the fact that direct voting results cannot reveal shades of opinion on an issue and, therefore, necessarily result in an "all or nothing" approach.[40] While noting these issues, the committee remained convinced of the benefits of seeking public input through a direct vote and ultimately concluded that most of the identified concerns could be overcome if constitutional direct votes were held at the discretion of the government and if the results of such votes were not binding on the government.[41]

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[38] *The Process For Amending the Constitution of Canada: The Report of the Special Joint Commitee of the Senate and the House of Commons*, Joint Chairmen: Hon. Gérald Beaudoin, Senator and Jim Edwards, M.P. (June 1991) at 69-70.

[39] *Ibid*. at 42. Note that this committee refers to a "consultative referendum." The fact that the committee chooses to qualify the term 'referendum' in this fashion suggests that the committee is using the term 'referendum' loosely to refer to all direct voting procedures and is not properly distinguishing between a plebiscite and a referendum (see definitions in Chapter I, n.4).

While the Beaudoin-Edwards Committee was working, the federal government continued to consider both substantive and procedural issues of constitutional reform. In his Throne Speech of May 13, 1991 (shortly before the release of the Beaudoin-Edwards Report), Prime Minister Brian Mulroney promised further consideration of constitutional issues. Mulroney also promised greater public participation in the process of reform, however, he was vague as to what form this participation would take.

Both before and after the release of the Beaudoin-Edwards report, the federal government vascillated on whether or not to hold a national direct vote on constitutional reform. As with the two previous national plebiscites, some government members apparently had significant concerns that direct voting mechanisms were not part of Canada's political tradition and were not an appropriate part of our Parliamentary system.[42] Given the results of the two previous direct votes, some members of the government were also concerned that such a vote on the constitution might divide the nation and further alienate Quebec from the rest of the country.[43] One popular news magazine described the situation in December 1991 as follows:[44]

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[40] *Ibid.* at 36-39.

[41] *Ibid.* at 42.

> Among some constitutional strategists in the federal Conservative party, it was referred to as the political equivalent of a nuclear weapon: an instrument of last resort with the potential to devastate the country if it was ever used. Still, until recently, the federal government seemed determined to add the capacity to call a national referendum on the Constitution to its legal arsenal. But the proposal has encountered fierce opposition from Quebec MPs, who claim that a national referendum could allow the rest of Canada to impose a settlement on Quebec.

This uncertainty over the holding of a national direct vote continued into the spring of 1992 when the government finally introduced direct voting legislation which generally accorded with the Beaudoin-Edwards Committee recommendations. Unfortunately, the decision to proceed with this legislation does not appear to have been made because of the government's resolution of the theoretical concerns associated with holding a direct vote. Instead, by most accounts, the legislation was introduced largely to alleviate pressure on the government for greater public participation in the reform process and to provide the highest degree of legitimacy possible to any constitutional amendments. It has also been suggested that the government saw a constitutional direct vote as a means of resolving the constitutional debates and obtaining final closure on the question of constitutional reform.[45] In any event, with these considerations in mind, the *Referendum Act*[46] became law on June 23, 1992.

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[42] See for example: M. Bowker, *Canada's National Referendum: What Is It All About?* (October, 1992) at 2 and Boyer, *supra* n. 4 at 53.

[43] B. Wallace and J. Stevenson, "From Crisis to Crisis: Bitter Political Controversy Over a Possible Referendum Dominates a Week of Turmoil" (December 9, 1991) 104:49 *Maclean's* 14 at 15.

[44] *Ibid*. at 14.

Most of the *Referendum Act* is devoted to procedural matters associated with holding a national direct vote, including the formation of the question, the issuance of the writ of referendum, the enumeration of voters and the regulation of campaign committees and expenditures. The essential enabling feature of the statute, however, is set out in section 3(1) which states:[47]

> Where the Governor in Council considers that it is in the public interest to obtain by means of a referendum the opinion of electors on any question relating to the Constitution of Canada, the Governor in Council may, by proclamation, direct that the opinion of electors be obtained by putting the question to the electors of Canada or of one or more provinces specified in the proclamation at a referendum called for that purpose.

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[45] See for example: Russell, *supra* n. 34 at 219 and Bowker, *supra* n. 42 at 2.

[46] S.C. 1992, c.30. Note that the title of this statute is technically somewhat of a misnomer: strictly speaking, because this Act does not make the results of a direct vote binding on the government, the direct votes contemplated by this statute are properly referred to as 'plebiscites' and not 'referendums'. (See Chapter I, n.4 for a more detailed definition of these terms). Given the name of this statute, however, the direct vote on the Charlottetown Accord became known in Canada as a referendum and may therefore be periodically referred to as such in this paper.

[47] *Ibid*. s. 3(1).

It should be noted that, while this provision certainly enables national direct votes to be held, it also significantly limits the use of such votes by specifying that these votes can only be held at the initiative of the government and by restricting the votes to constitutional questions. Further, nothing in this section or the rest of the statute makes the voting results legally binding on the government. Consequently, while this statute enables the government to add a national direct vote to its arsenal of devices to effect or block constitutional change, it does not alter the country's constitutional amending formula or otherwise add to the government's legal obligations when dealing with constitutional reform.

Unlike the plebiscite statutes of 1898 and 1942, the 1992 *Referendum Act* was not passed with reference to any specific question. In fact, at the time the statute was passed, negotiations on the content of a constitutional reform package were ongoing. While this difference in timing prevented the debates on the proposed legislation from becoming unduly entangled with the substance of a suggested referendum question (as occurred in 1898 and 1942), it has also been suggested that the Mulroney government's delay in committing to the concept of a direct vote on constitutional reform prevented the negotiators and drafters of the reform proposals from adapting their work to the direct voting procedure:[48]

The real problem with the Mulroney government's late conversion to a

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[48] Russell, *supra* n. 34, at 207-208.

> constitutional referendum was that the development of constitutional proposals was completely detached from the referendum process. The politicians, officials, and experts closeted together negotiating the constitution through the spring and early summer of 1992 were not consciously working towards a referendum. The product of their labours - an agreement containing some sixty clauses sprinkled with asterisks marking unfinished business to be settled by more negotiations in the future - was not a document designed for popular ratification by the people. An agreement fashioned in this process was treated by its drafters as a contract between heads of governments and organizations that expected to have a final say on the matter. The penalty of pursuing a two-track approach to constitutional revision - elite negotiations and popular ratification - was that they came too late to provide the foundation for a real social contract.

In these circumstances, a lengthy agreement for reforming the constitution was drafted, addressing a number of long-standing controversial issues including the status of Quebec, Aboriginal self-government, Senate reform, and economic matters. This agreement, known as the Charlottetown Accord, was signed by the first ministers on August 28, 1992. Then, in September 1992, acting under the authority of the new *Referendum Act*, the Mulroney government officially called a national direct vote on the Charlottetown Accord. The question to be voted on was: "Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992?"[49]

One of the first issues which had to be resolved before the vote on the Charlottetown Accord could be held concerned the interaction between the federal *Referendum Act* and direct voting legislation already in place in some provinces. At the time the national vote was called, Alberta, British Columbia and Quebec each had provincial legislation in place which required a provincial referendum to be held on any proposed constitutional amendments.[50] Given the federal government's initiative for a national direct vote, Alberta and British Columbia agreed not to use their referendum legislation and to enable their provincial requirements to be satisfied through the national vote. Quebec, on the other hand, insisted on holding a referendum on the Charlottetown Accord pursuant to its provincial legislation. Quebec did agree, however, to hold the provincial referendum on the same day as the national vote and on the same question as the national vote. Accordingly, the "national" direct vote on the Charlottetown Accord strictly speaking consisted of two separate votes: a provincial referendum in Quebec and a federal vote in the remaining areas of the country. The major practical effect of this approach was to restrict the referendum campaign in Quebec to the specific procedures provided for in the Quebec legislation.[51]

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[49] Boyer, *supra* n. 4, at 67.

In the 38 days of campaigning before the October 26, 1992 vote, the Charlottetown Accord was aggressively debated across the country. The campaigns on both sides of the question ranged from commentaries on specific, substantive aspects of the Accord to discussions on the general purpose and effect of the proposal.[52] Further, although it is often suggested that elections are primarily about people while referendums and plebiscites are mainly about policies, a good deal of the campaigning on the Charlottetown Accord seemed directed at linking the proposed policy with political personalities. For example, supporters of the "no" side of the debate took great pains to link a "yes" vote to the increasingly unpopular Brian Mulroney and other perceived political elites and to associate a "no" vote with the constitutional wisdom represented by former Prime Minister Pierre Elliott Trudeau.[53]

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[50] The statutes in question were: *The Constitutional Referendum Act*, S.A. 1992, c. C-22.25; *Constitutional Amendment Approval Act*, S.B.C. 1991, c. 2; *An Act Respecting the Process for Determining the Political and Constitutional Future of Quebec*, S.Q. 1991, c.34.

[51] For further consideration of the question of whether the vote on the Charlottetown Accord consisted of one national direct vote or two direct votes (one in Quebec and one in the rest of the country) see the discussion of *Haig* v. *Canada* in Section IV.B.ii of this Chapter and in Section II.B. of Chapter V.

Whatever the diversity or complexity of the campaign strategies, however, when the polls closed on October 26, 1992, the results of the vote were unequivocal. With 75 percent of the eligible voters casting a ballot, the Charlottetown Accord was rejected by 54.2 percent of the electorate. The Accord was soundly rejected in most of the provinces, with majority votes in favour of the measure being recorded only in the Northwest Territories, Newfoundland, New Brunswick, Prince Edward Island and Ontario.[54] Although the government was not legally bound by these results, practically the vote killed the Charlottetown Accord and prompted the federal government and its provincial counterparts to back away from further attempts at constitutional reform.

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[52] For a more detailed discussion of the campaigns, see C. Vander Ploeg, "The Referendum on the Charlottetown Accord: An Assessment", *Canada 2000: Towards a New Canada*, (Canada West Foundation, 1993).

[53] Boyer, *supra* n. 4, at 72.

[54] Russell, *supra* n. 34, at 227.

Despite the nation's overwhelming rejection of the Charlottetown Accord and the government's response in abandoning constitutional renewal, the real meaning of the voting results is difficult to determine. Because the Charlottetown Accord itself dealt with so many elements of constitutional change, one cannot say with certainty why so many people rejected the Accord and, consequently, speculation on this issue has been rampant. Some commentators have suggested that the vote illustrates the voters' repudiation of politicians and business elites perceived to have drafted the proposal,[55] however this view has been rejected by others who argue that many political elites were positioned on the "no" side of the question.[56] It has also been suggested that the Accord was defeated because outside Quebec it was seen as giving Quebec too much while inside Quebec it was perceived as giving Quebec too little.[57] In contrast to this position, still others have postulated that the strong "no" vote outside of Quebec was the result of strategic voting on the part of English speaking Canadians who were concerned about the possible alienation of Quebec if Quebec voted "no" while the rest of the country voted "yes".[58] There has also been some evidence raised to suggest that many ballots were cast with the intention of injuring the increasingly unpopular federal government.[59]

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[55] L. Gunter, "Canada After the Uprising: The Rejection of the Accord and its Elite Backers Augers Well for the RPC" (November 9, 1992) 19:47 *Alberta Report* 6 at 6.

[56] Boyer, *supra* n. 4, at 73.

[57] Russell, *supra* n. 34, at 226.

[58] Boyer, *supra* n. 4, at 70.

[59] Vander Ploeg, *supra* n. 52, at 1.

Still, notwithstanding the inherent difficulty in interpreting the meaning of the referendum results, the vote on the Charlottetown Accord was clearly unique to Canadian experience in several ways. First, as already noted, the 1992 vote was the first national plebiscite on a constitutional matter. Second, this vote was the only nation-wide direct vote which resulted in a clear-cut defeat of the government's proposition, leaving the government with no viable political option except to abide by the will of the people as expressed in the voting results. Finally, because the Accord was defeated in one province in every region of the country, the voting results illustrate little regional cleavage. Although there remains a considerable degree of uncertainty as to the regional implications of the voting results, the results do reflect one clear message: "a majority of Canadians were simply not satisfied with the vision of constitutional renewal embodied in the Charlottetown Accord."[60]

II. PROPOSED NATIONAL DIRECT VOTES

As indicated above, although only three national direct votes have been held in Canada to date, the idea of resolving crucial or controversial issues through a country-wide direct vote has been considered by Canadian politicians on several occasions. The scope of consideration given to this idea has ranged from the mere suggestion of holding a referendum or plebiscite to the tabling of draft legislation enabling direct votes to be held. The topics which have evoked direct voting proposals have included both matters of constitutional reform and ordinary legislative issues.

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[60] *Ibid.*

A. Matters of Constitutional Reform

The concept of holding a national direct vote on constitutional reform originated long before the 1992 vote on the Charlottetown Accord. In the 1960's, the idea of holding a national vote formed part of the federal-provincial discussions leading to the creation of the Fulton-Favreau formula for constitutional amendment.[61] Although the idea was rejected at that time, it resurfaced as an option for facilitating constitutional reform in the Pepin-Robarts Report on national unity, commissioned by the federal government in 1979.[62] Prior to the 1990's, however, the greatest pressure for a national direct vote on constitutional reform was brought in the 1970's and 1980's by Prime Minister Trudeau in the course of his effort to amend and patriate the constitution.

In the latter part of the 1970's, questions of national unity and particularly of Quebec's role in Canada put significant pressure upon Trudeau's administration. Faced with the possibility of a Quebec referendum on sovereignty association, Trudeau sought to implement federal referendum legislation which would permit the conduct of a national vote to counter the provincial vote contemplated by Quebec's referendum law.

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[61] Boyer, *supra* n. 4 at 42.

[62] J.L. Pepin & J. Robarts, *The Task Force on Canadian Unity: A Future Together* (January, 1979).

Accordingly, on October 19, 1977, Trudeau announced that his government would introduce legislation to permit and regulate national referendums and, on April 3, 1978 Trudeau introduced a bill for the *Canada Referendum Act*.[63] In Trudeau's vision, the purpose of this legislation was not to enable national direct votes to be held on every issue before Parliament but instead was to permit such votes to be held on particular issues of national unity and constitutional reform.[64]

Like 1992's federal *Referendum Act*, Trudeau's proposed legislation included a general enabling provision along with a detailed outline of procedures to be followed in conducting a national vote. The enabling provision in Trudeau's bill was somewhat broader in scope than that found in the 1992 statute, however, because it did not restrict the subject of a national direct vote to a constitutional question. Instead, Trudeau's proposal provided that, upon a proclamation issued by the Governor-in-Council, a question could be put to the people on the topic of the constitution or on any other question "deemed to be of sufficient importance to warrant obtaining the opinion of the electors."[65] Although this bill was introduced in two consecutive sessions of Parliament, it ultimately died on the order paper when Parliament was dissolved before the federal election of May, 1979 (following which the Conservative Party formed a minority government under the leadership of Joe Clark). During the debates held on

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[63] Boyer, *supra* n. 4, at 43.

[64] *Ibid.*

[65] *Ibid.* at 45.

Trudeau's bill, the primary concerns raised with respect to the measure once again included the compatability of a direct voting scheme with the Parliamentary system of government and the type of issues which would be appropriate for a national vote.[66]

Having regained the office of Prime Minister in 1980, Trudeau once again raised the possibility of a national referendum on the constitution. This time, faced with significant provincial opposition to his proposed constitutional reforms, Trudeau sought to include in his constitutional package a provision for public ratification of his government's constitutional proposals. This suggestion was strongly opposed by some of Trudeau's own cabinet ministers as well as some provincial premiers. Eventually Trudeau was forced to give up the idea of a national direct vote as part of a compromise arrangement which enabled Trudeau to patriate the constitution with the approval of nine provinces. In arriving at this compromise, Trudeau noted that it was to his "everlasting regret" that referendum provisions would not be included in the constitutional amendment package.[67]

B. Ordinary Legislative Issues

As noted above, the idea of holding a national direct vote on non-constitutional matters has arisen on numerous occasions with respect to a variety of issues. Some of the topics on which Parliament has considered holding a national referendum or plebiscite have included unemployment insurance, capital punishment, Quebec separatism, bilingualism, metrification, abortion and Canada-U.S. free trade. In each of these instances, it appears that a direct vote was considered as a possible means of resolving what was generally perceived to be a very controversial matter. In most cases, however, when the suggestion for a direct vote was discussed in Parliament, it met with the usual concern over whether such a vote would be an abdication of the responsibilities of a representative government. Obviously, a direct voting scheme was not adopted in any of these situations.[68]

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[66] *Ibid*. at 42-44.

[67] S. Clarkson & C. McCall, "Trudeau's Great Paper Chase", *The Globe and Mail*, October 27, 1990, D1 & D5.

Many of the suggestions to hold a national direct vote on the above noted topics took the form of private member's bills brought into the House of Commons by government backbenchers. Like the 1989 and 1942 plebiscite statutes, these private member's bills were generally topic specific, enabling a national vote to be taken only with respect to a particular matter. In 1988, however, J. P. Boyer, the Conservative Member of Parliament for Etobicoke-Lakeshore, introduced a lengthy private member's bill[69] which was not linked to any specific issue and which was intended to serve as "comprehensive enabling legislation for initiatives, referendums, and plebiscites" on a national level.[70]

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[68] For a detailed discussion of the circumstances where direct voting has been suggested with relation to these issues, see: Boyer, *supra* n.4, at 46-49.

[69] Private Member's Bill for *The Canada Referendum and Plebiscite Act*, Bill C-311 (July 21, 1988); Bill C-2 (December 14, 1988); Bill C-257 (September 26, 1989); Bill C-201 (May 15, 1991); and Bill C-287 (September 23, 1991).

[70] Boyer, *supra* n. 4, at 49.

Being an avid proponent of direct democracy and an expert on election law[71], Boyer was apparently inspired to introduce his private member's bill partly because of his concern that, historically, debates over whether a national direct vote should be held too often included discussions on the merits of the proposed topic for the national vote. According to Boyer:[72]

> The problem of creating enabling legislation when a government is contemplating a specific vote on a particular topic is that the procedure for taking the votes invariably gets mixed up with the substance of the question to be submitted to the people. This was the Canadian experience with the 1942 national plebiscite on conscription for overseas military service. Likewise, substance and form became mixed when special statutory provisions had to be developed for the 1898 national prohibition plebiscite. There is value in avoiding a blending of the problem and the process. We do not, after all, enact a new Canada Elections Act on the eve of each general election. So why should we do it for a similar procedure where Canadians are asked to express a verdict on an issue at the ballot boxes?

Given this concern, in addition to providing an extensive outline for voting and campaign procedures in a national direct vote, Boyer's bill contemplated four circumstances when such a vote could be held. First, a referendum could be held on any bill adopted by both houses of Parliament if, at the time of its tabling in Parliament, the bill contained a provision indicating that the bill could not come into effect until approved through a national referendum. Second, a plebiscite could be held on a question approved by both houses of Parliament. Third, a referendum on a constitutional matter could be held if approved by both houses of Parliament. Finally, a referendum or plebiscite could arise on a question submitted by a petition signed by 10 percent of the electors.

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[71] Boyer has written a number of books on election law and direct voting, including: *Political Rights: The Legal Framework of Elections in Canada* (1981); *Money and Message: The Law Governing Election Financing, Advertising, Broadcasting and Campaigning in Canada* (1983); *Election Law in Canada: The Law and Procedure of Federal, Provincial and Territorial Elections* (1987); *Lawmaking by the People: Referendums and Plebiscites in Canada* (1982); *The People's Mandate: Referendums and a More Democratic Canada* (1992); *Direct Democracy in Canada: The History and Future of Referendums* (1992).

[72] Boyer, *supra* n. 4, at 49.

Although Boyer continuously kept the proposed *Canada Referendum and Plebiscite Act* before Parliament from 1988 to 1992, this bill was not debated in Parliament until June 18, 1991 and was never voted on.

III. DIRECT VOTING IN THE PROVINCES AND TERRITORIES

A. General Provisions

Although Canada's national direct voting experience has been limited to only three occasions, since Confederation a substantial number of plebiscites and referendums have been carried out at the provincial or territorial levels.[73] Since this paper is intended to focus on referendums and plebiscites at a national level, a detailed consideration of the various provincial and territorial direct votes will not be undertaken at this point. From a brief overview of direct voting at the regional level, however, it can be noted that direct democracy is not as unique in Canada as our national experience might suggest and that direct voting has co-existed and can continue to co-exist with our system of representative democracy.

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[73] For a detailed listing and discussion of the provincial referendums and plebiscites conducted to date, see: C. Vander Ploeg, "Letting the People Decide: A Canadian Constitutional Referendum", *Alternatives '92: Towards a New Canada* (Canada West Foundation, September 1992) at 9 - 12; and Boyer, *Lawmaking by the People*, *supra* n. 71; and Boyer, *supra* n. 4.

As indicated above, early in post-Confederation history, the subject of liquor control spawned a number of plebiscites and referendums on a provincial or local level. In fact, the vast majority of provincial direct votes have been on the topic of liquor regulation. Around the early part of this century, direct voting was recognized further when, as a result of the progressive movement in western Canada, British Columbia, Alberta, Saskatchewan and Manitoba each passed legislation providing for both government and citizen-initiated direct votes. Although these statutes were not always proclaimed or successfully utilized, their passage did reflect an acceptance of direct voting at a provincial level. Since that time, provincial and territorial governments have continued to utilize referendums and plebiscites "as an extension of their efforts to seek support on controversial issues."[74] These issues have included matters such as a province's status within the country (in the cases of Newfoundland and Quebec), daylight savings time (in the cases of British Columbia, Alberta and Saskatchewan) and territorial boundaries (in the case of the Northwest Territories).[75] Although these regional votes have usually been advisory only, the governments in question have generally abided by the results.[76]

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[74] D. MacDonald, "Referendums and Federal Elections in Canada", *Democratic Rights and Electoral Reform in Canada* (ed. M. Cassidy, Vol. 10 Research Studies, Royal Commission on Electoral Reform and Party Financing, 1991) at 314.

[75] Vander Ploeg, *supra* n. 73, at 9-12.

Currently, every province except Ontario, Nova Scotia and Manitoba have legislation in place providing for a direct vote to be taken on a general question of public policy. In this regard, British Columbia, Saskatchewan, Quebec, Prince Edward Island, the Northwest Territories and the Yukon Territory all have passed specific legislation enabling province-wide direct votes to be taken on acts of the legislature or on matters regarding which the government finds the expression of public opinion to be desirable.[77] (Whether or not these votes are binding on the government varies with the legislation). Similarly, in Alberta, Newfoundland, and New Brunswick provisions have been incorporated into the provincial election statutes to enable provincial plebiscites to be held on matters of public concern at the discretion of Cabinet.[78] Finally, as previously noted, Alberta and British Columbia also have specific statutes in place requiring provincial referendums to be held on matters of constitutional reform.[79]

In addition to the above noted statutes permitting regional direct votes, every province and territory also currently has in place one or more statutory provisions permitting direct votes to be held at the local or municipal levels.[80] Generally, these provisions are found in statutes establishing local and municipal governments. They are, however, also included in legislation pertaining to specific topics or institutions such as school boards, public utilities, local franchises and libraries. Accordingly, across the nation there exists a plethora of provincial legislative provisions for local referendums and plebiscites to be held on a variety of matters which may be particularly controversial. Such matters include liquor laws, municipal or local by-laws, fluoridation, local franchises, and Sunday openings.

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[76] *Supra* n. 74 at 312.

[77] The statutes in question are: *The Referendum Act*, S.B.C. 1990, c. 68; *The Referendum and Plebiscite Act*, S.S. 1990-91, c.R-8.01; *Referendum Act*, S.Q. 1978, c.6; *Plebiscites Act*, R.S.P.E.I. 1988, c. P-10; *The Plebiscite Ordinance*, S.N.W.T. 1981, c. 13 (3rd); *Plebiscite Act*, R.S.Y. 1986, c. 1337.

[78] See: *The Election Act*, R.S.A. 1980, c. E-2, ss. 125-128; *The Election Act*, R.S.N. 1970, c. 106, s. 171; *The Elections Act*, R.S.N.B. 1973, c. E-3, s. 129.

[79] *Supra* n. 50.

Although the extent of direct voting at a local level varies from province to province, the great expanse of legislation enabling direct votes to be held on a local level suggests an overall acceptance of direct democracy at least at the community level. One explanation for this apparent acceptance of local plebiscites or referendums may be that people within a narrow community are more closely connected to projects or issues arising in the area and therefore should be entitled to have a direct influence on these matters:[81]

> This [popular] approach to local direct democracy springs from a pragmatic approach to municipal government, one which holds that people who will have to pay extra money for special projects should have a direct say in the matter. The right of direct democracy is available mainly in municipalities, because the most immediate and specific correlations about local public works can be drawn

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[80] For a detailed discussion of these statutory provisions, see Boyer, *supra* n. 4, at 190-222.

[81] *Ibid*. at 190.

by the local citizenry.

This reasoning may also explain why it is only at the local level that any form of popularly initiated direct voting is currently used in Canada.[82]

B. Quebec's 1980 Vote on Sovereignty-Association

Any discussion of direct voting in Canada would not be complete without at least a brief examination of the country's most renowned provincial direct vote: namely, the 1980 Quebec referendum on sovereignty-association. Although this vote was held pursuant to provincial legislation and only Quebecers were permitted to cast ballots, the question which was voted upon had serious implications for the country as a whole. Accordingly, Quebec's experience in this direct vote is certainly relevant to the consideration of the utility and desirability of nation-wide referendums and plebiscites, particularly on matters of constitutional reform.

Since Confederation, Quebec has had an uneasy relationship with the rest of Canada. Although many forces have contributed to this uneasiness, primary among these factors has been the concern of Quebecers that their French language and culture be preserved and maintained in spite of Canada's dominant English-speaking population. This concern has frequently led some Quebecers to suggest that Quebec should separate from Canada and become a nation unto itself. This proposal for Quebec separatism gained substantial political force in 1976 when the Parti Quebecois, with its plans for an independent Quebec economically associated with Canada, won the Quebec provincial election.

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[82] Vander Ploeg, *supra* n. 73 at 12.

Since the early 1970's, the Parti Quebecois advocated a step-by-step approach to achieving independence for Quebec. Among other things, these steps envisioned an initial provincial referendum to give the government a mandate to negotiate the terms of separation with the Canadian government and a second provincial referendum to approve the substance of these negotiations.[83] In keeping with this plan, following the 1976 provincial election, the Parti Quebecois passed the necessary legislation to enable province-wide direct votes to be held.[84] On April 15, 1980, Premier Rene Levesque announced that the direct vote to authorize the Quebec government to begin negotiating the terms of Quebec's independence would take place on May 20, 1980.

The question which the people of Quebec voted on in May, 1980 was worded as follows:

> The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad--in other words, sovereignty--and at the same time, to maintain with Canada an economic association including a

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[83] For a more detailed discussion of the Parti Quebecois' step-by-step plan, see Boyer, *supra* n. 4, at 133.

[84] The legislation in question was the *Referendum Act*, *supra* n. 77 which still remains on Quebec's statute books today.

> common currency; no change in political status resulting from these negotiations will be effected without approval by the people through another referendum; on these terms, do you give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?

Ultimately, this question was answered by 3,673,752 members (85.61 percent) of the Quebec electorate. Of these participants, 59.56 percent voted against the measure and 40.44 percent voted in support of the measure.[85] For at least the immediate future following this vote, these results seemed to quiet Quebec's separatist forces and encourage the federal government's initiatives for a renewed Canadian federation.

Despite the "emotional impact of the subject" and the "intense campaigning" that characterized the Quebec referendum, it is "generally accepted that the referendum on sovereignty-association held in May of 1980 was well-administered, and in general, quite fair."[86] This is not to say, however, that this direct vote was free from criticism and suspicion. For example, one common criticism levied both before and after the vote was taken is that the question put forward by the Quebec government was worded to favour an affirmative response. In particular, it is suggested that the question skirted the real issue by avoiding any direct reference to Quebec's independence and by focusing instead on the negotiation of an economic association with Canada and another direct vote in the future. It is also suggested that the question favoured sovereignty-association because it failed to even mention the option of a renewed Canadian federation.[87]

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[85] Boyer, *supra* n. 4 at 148.

[86] Vander Ploeg, *supra* n. 73 at 8.

Another common criticism of this referendum concerns the campaigning preceding the vote. Pursuant to Quebec's *Referendum Act*, campaigning on the question was to be done under one of two "umbrella" committees. This provision was designed to ensure relative equality in campaign advertising and expenditures for each side of the issue. Both the federal government and the government of Quebec were accused of violating these campaign rules. The federal government in particular was criticized for attempting to improperly influence the decision of Quebec voters through its own advertisements.[88]

With the issue of Quebec separatism again at the forefront of the Canadian agenda today, some may argue that the 1980 referendum on sovereignty-association solved nothing and failed to provide any lasting resolution to the question of Quebec's relationship with the rest of the country. In reality, however, the results of the Quebec referendum afforded the federal government with the opportunity to attempt to negotiate a renewed federation without the imminent threat of Quebec's independence. Certainly, the inability of our political leaders to arrive at an arrangement which would satisfy Quebec is not attributable to the 1980 vote. In any event, Quebec's referendum on sovereignty-association offers valuable lessons regarding the use of direct voting mechanisms in this country, particularly with regard to the wording of referendum or plebiscite questions and the structure and operation of direct voting campaigns.[89] Perhaps most importantly, however, the 1980 referendum demonstrated that direct votes can be successfully used in Canada to enable the people to provide government leaders with direction on critical constitutional issues. In this regard, it should be noted that, while the people of Quebec certainly elected a separatist party to office in 1976, the results of the 1980 referendum suggest that Quebecers were not necessarily prepared to give their new government a mandate to pursue a separatist agenda. This ironic circumstance illustrates again the different considerations which voters may bring to the election of a representative versus those which voters may bring to a direct vote.

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[87] Boyer, *supra*, n.4 at 137-138.

[88] See Vander Ploeg, *supra* n. 73 at 8 and Boyer, *supra* n. 4 at 147.

IV. JUDICIAL INTERPRETATION OF DIRECT VOTES AND DIRECT VOTING LEGISLATION

As one would expect, because most of Canada's direct voting experience has occurred at the local government level, the vast majority of Canadian case law on the topic deals with or arises from local referendums, plebiscites and petitions or their enabling legislation. For the most part these cases do not deal with the theoretical principles underlying direct democracy and instead concern themselves primarily with matters related to direct voting procedures (matters which are beyond the scope of the present discussion). For example, Canadian courts have often considered whether a referendum or plebiscite question was properly worded or within the authority of the level of government posing the question, whether the question was properly authorized by the appropriate legislation, whether the vote was binding on the government initiating the question, whether the results of the vote were effected by an irregularity in the voting procedure, and whether petitions could be utilized by the electors to force a referendum or plebiscite.[90] In addition to the multitude of cases which have addressed these types of procedural questions, however, to date there have been at least four court decisions which have specifically considered the constitutional validity of provincial and national direct voting statutes in Canada and which have therefore focused on the underlying theory and the legality of direct voting. Two of these cases have examined direct voting from a division of powers perspective and two of the decisions have dealt with the validity of direct voting legislation under the *Canadian Charter of Rights and Freedoms*. Still, as the following discussion demonstrates, all four cases to varying degrees help to define the role which direct voting legislation can legitimately play in Canada as well as to identify the limitations which may properly be imposed on that role.

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[89] As indicated in Chapter I, these issues pertain to the "practical" aspects of employing direct voting mechanisms and accordingly will not be dealt with in this paper.

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[90] For a more detailed discussion of direct votes at the local level, see: Boyer, *supra* n. 4 and Vander Ploeg, *supra* n. 73 at 12.

A. The Division of Powers

(i) *Re the Initiative and Referendum Act*[91]

This case concerned the constitutional validity of the *Initiative and Referendum Act*, a statute passed by the Manitoba government as part of the Progressive movement in the early 1900's. The purpose of this Act was to permit laws for the province of Manitoba to be made and repealed through a direct vote of the electors rather than only by the legislative assembly. Before this statute was ever used, however, the Manitoba government referred this legislation to the courts to determine its constitutional validity. Ultimately, the Judicial Committee of the Privy Council found that the legislation was *ultra vires* the provincial government.

In summary, the *Initiative and Referendum Act* provided that a group of electors (being not less than 8 percent of the number of voters polled at the last election) could submit a proposed law to the legislative assembly by petition. The Act further required that, unless the proposed legislation was enacted by the Assembly without substantial change or the petition asked for a special referendum vote on the proposed legislation, the proposed legislation had to be submitted to a vote of the electors at the next general provincial election. If the bill was approved by a majority of the electors, it would be proclaimed as law by the Lieutenant-Governor within thirty days. The Act made similar provisions for public involvement in the repeal of legislation. With a few exceptions, the Act also prohibited any law passed by the legislature from taking effect for three months after the end of the session in which it was passed in order to provide the electorate with sufficient time to decide whether to initiate a public vote on a new law.

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[91] (1919) 48 D.L.R. 18 (J.C.P.C.).

In considering the constitutional validity of the *Initiative and Referendum Act*, the Judicial Committee of the Privy Council focused on the statute's effect on the role of the Lieutenant-Governor. In the court's opinion, by requiring the Lieutenant-Governor to proclaim legislation approved by the electors, the statute effectively removed the Lieutenant-Governor's discretion to approve legislation and thereby altered the powers conferred upon the Lieutenant-Governor by the provincial constitution. The court noted that:[92]

> . . when the Lieutenant-Governor gives to or withholds his assent from a Bill passed by the Legislature of the Province, it is in contemplation of law the Sovereign that so gives or withholds assent. . . It follows that if the Initiative and Referendum Act has purported to alter the position of the Lieutenant-Governor in these respects, this Act was insofar ultra vires.
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> Their Lordships are of opinion that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the Lieutenant-Governor as an integral part of the Legislature, and to detract from rights which are important in the legal theory of that position. For if the Act is valid it compels him to submit a proposed law to a body of voters totally distinct from the Legislature of which he is the constitutional head, and renders him powerless to prevent it becoming an actual law if approved by a majority of these voters.

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[92] *Ibid*. at 24.

Given the above characterization of the legislation, the Privy Council concluded that the *Initiative and Referendum Act* was unconstitutional because it altered or amended the office of the Lieutenant-Governor. According to section 92 of the *Constitution Act, 1867*,[93] the provinces were not empowered to change the role of the Lieutenant-Governor.

From a practical standpoint, the decision of the Privy Council in this case served to quash the Manitoba government's enthusiasm to enact general, direct voting legislation. Although provincial plebiscites have been held in Manitoba since the *Initiative and Referendum Act*, these votes have been held under topic specific enabling statutes rather than under broad direct voting legislation.

From the point of view of a legal precedent, the *Re Initiative and Referendum Act* case is a valuable reminder that, in order to be constitutionally valid, any legislation enabling direct votes to be held must not exceed the limits imposed by the Canadian constitution and must fall within the powers of the government purporting to enact the legislation. More specifically, with respect to provincial direct voting legislation, this case establishes the principle that:[94]

> a provincial legislature cannot substitute for its own parliamentary processes the

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[93] (U.K.) 30 & 31 Vict., c.3, s.92.

[94] Boyer, *supra* n. 4, at 90-91.

> original making or repealing of provincial laws by direct vote of the electors of the province unless, in that delegation of the lawmaking function, the role of Lieutenant-Governor is preserved. A provincial legislature cannot, therefore, make general provision for plebiscites or referendums that are legislatively self-executing. A provincial legislature may pass a statute to provide for a popular vote that is advisory about a specific legislative change, so that the subsequent execution of the change would still be at the discretion of the provincial legislature. That means the measure would require the normal passage of a statute through the legislature, followed by royal assent given by the Lieutenant Governor on behalf of the Crown.

Beyond these few points, however, this case arguably provides little guidance as to the role of or limitations upon direct voting legislation in Canada because it was decided on such narrow grounds. In fact, since the roles of the Lieutenant-Governor and the Governor-General are becoming increasingly viewed as formalities in the legislative process, it is questionable whether today's courts would even agree with the Privy Council's characterization of the *Initiative and Referendum Act* as significantly limiting the role of the Lieutenant-Governor. As one commentator notes:[95]

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[95] *Ibid*. at 90. Some analysts also suggest that the principle set down in *Re Initiative and Referendum Act* was overturned by the Privy Council's subsequent decision in *R*. v. *Nat. Bell Liquors Limited* [1922] 2 A.C. 128. In the *Nat Bell* case, the court considered a liquor company's appeal from its conviction for violating Alberta's *Liquor Act*. The *Liquor Act* had been passed by the Alberta legislature with little discussion after being approved in a province-wide plebiscite held pursuant to direct voting legislation then existing in the province. As part of its defence, Nat Bell argued that the *Liquor Act* was *ultra vires* the province of Alberta because it had effectively been enacted by both the people and the legislature rather than exclusively by the legislature as required by the Canadian constitution. In rejecting this defence, the Privy Council held that, having been passed by the legislature and assented to by the Lieutenant-Governor, the *Liquor Act* was valid provincial legislation even if the Alberta legislature had been obligated to pass the Act as a result of provincial direct voting legislation. While this conclusion initially seems to overlook some of the crucial considerations which guided the court's decision in *Re Initiative and Referendum Act*, it is important to note that the court in the *Nat Bell* case was careful to note that the direct voting legislation which led to the passage of the

> While perhaps true in a legalistic or technical sense, the Judicial Committee's interpretation ignored the reality that, under our evolving nature as a constitutional monarchy, even by 1919 the royal assent given to legislation to make it law was a formality. No Lieutenant Governor would refuse to sign a law into being; the decision regarding when to send a bill for assent rested with the legislature. Even after it was signed by the Lieutenant Governor, the government could decide when, or even whether, to proclaim it in force.

Accordingly, just as it would currently be politically untenable for the Lieutenant Governor to refuse to sign legislation duly passed by the legislature even though he has the legal authority to do so, it would likely be equally unacceptable for the Lieutenant-Governor or the Governor-General to refuse to sign legislation approved by a majority of electors under direct voting legislation.

(ii) *Greater Hull School Board* v. *Attorney General of Quebec*[96]

This case, decided by the Supreme Court of Canada in 1984, involved the constitutionality of amendments to the *Education Act* of Quebec. Generally, the amendments in question outlined a new system of school financing which was based primarily on government grants, with taxation by school boards playing only a complementary financial role. Under this new system, the Minister of Education was to

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Liquor Act had not been challenged. Accordingly, the court did not make any ruling regarding the constitutionality of Alberta's direct voting legislation. It is therefore questionable whether the *Nat Bell* case really has any bearing on the court's reasoning in *Re Initiative and Referendum Act*, where direct voting legislation was considered by the court.

[96] (1984) 56 N.R. 99 (S.C.C.).

set grant amounts and the school authorities were permitted to tax only for expenses in excess of these grants. In certain circumstances, however, the school boards were required to submit the tax assessments to the electors for approval in a referendum.

The legislative amendments authorizing the new system were challenged by various school authorities on the ground that the amendments violated section 93 of the *Constitution Act, 1867.*[97] Section 93 prohibits a province from enacting any legislation pertaining to education which prejudicially affects "any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union." In particular, the applicants argued that the requirement for a referendum violated section 93 for three reasons: first, because the duty to hold a referendum prejudicially affected the taxing power of the commissioners and trustees; second, because the referendum procedure was so costly and cumbersome that it would impede the taxing power of the commissioners and trustees; and third, because the referendum provision prejudicially affected the school board's authority by permitting any elector to vote in the referendum whether or not his or her religious affiliation was that of the school board in question.

In rendering its decision in this matter, the Supreme Court spent considerable time dealing with the validity of the amendments which were not specifically related to the referendum requirements. For the present purposes, it is sufficient to note that the

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[97] *Supra* n. 93, s.93.

Supreme Court held that these non-referendum provisions did violate the constitution and were therefore ultra vires the provincial legislature. With respect to the constitutional validity of the direct voting requirements, the majority of the Court concluded that the duty imposed on the school board to hold a referendum did not impede the taxing right or authority of the board but rather merely conferred a supervisory power on persons who were beneficiaries of the constitutional guarantees in question. Further, the majority of the Court found that the applicant had not been able to successfully show that the cost and logistics of holding a referendum would be so cumbersome as to amount to a denial of the rights guaranteed by section 93. The entire Court did, however, find that section 93 was violated by the legislative provision which permitted all electors to vote in a taxation referendum, regardless of whether they fell within the jurisdiction of the school board proposing the tax increase in question. In considering this provision, the Court found that:[98]

> This means that the increase in tax occasioned by a particular school board is subject to approval by all the electors in the Island of Montreal. It follows that the school board in question may have its decision rejected or approved by the vote of electors who are not subject to its administration. This in my opinion is a prejudicial invasion of the powers guaranteed by s. 93 of the *Constitution Act, 1867*. . . It is a prejudicial invasion of the rights and privileges of classes of persons encompassed by s. 93 to subject the exercise of the power of a school board to decide on an expense requiring a tax, to the approval of all electors in the Island of Montreal, whatever school board they belong to and whatever their religious affiliation.

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[98] *Supra* n. 96 at 123-124.

On the basis of this reasoning, the Court ultimately held that the direct voting provisions of the amended legislation were *ultra vires* the province.

Like the decision of the Privy Council in *Re the Initiative and Referendum Act*, the Supreme Court's decision on the constitutionality of the referendum contemplated in this case appears to have been based upon very narrow grounds. Once again, however, this case emphasizes that legislation providing for direct voting must properly comply with the constitutional division of powers and the protections afforded to minorities under that constitutional scheme. Further, as a result of the Supreme Court's conclusions on the first two of the applicants' arguments, this case appears to go farther than the decision in *Re the Initiative and Referendum Act* by implicitly recognizing the legitimacy of a referendum as a legislative tool designed to safeguard the public interest.

B. The *Canadian Charter of Rights and Freedoms*[99]

(i) *Allman* v. *Commissioner of the Northwest Territories*[100]

This case arose as a result of a plebiscite conducted in the Northwest Territories on April 14, 1982 on the question "Do you think that the Northwest Territories should be divided?" The vote was conducted pursuant to the Northwest Territories *Plebiscite Ordinance*[101] which prescribed a three year residency requirement for voting on the plebiscite. Twelve residents of the Northwest Territories who were ineligible to vote in the plebiscite because they had not lived in the area for three years applied to the court for a declaration that the residency requirement in the *Plebiscite Ordinance* violated their freedom of expression and their mobility rights as guaranteed by sections 2(b) and 6 respectively of the *Canadian Charter of Rights and Freedoms*.[102] Ultimately, the Northwest Territories Court of Appeal disagreed with both of these arguments and found the residency requirements in the legislation to be constitutionally valid.

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[99] *Canadian Charter of Rights and Freedoms*, as enacted in *Canada Act 1982* (U.K.), c. 11,

[100] (1983) 50 A.R. 161 (N.W.T.C.A.).

With respect to the claim under section 2(b) of the Charter, the Court of Appeal extensively considered the purpose and meaning of the constitutional guarantee of freedom of expression and concluded that the primary role of this guarantee is to act as a safeguard against government repression of the inherent human right to freedom of speech and opinion. The Court determined, however, that freedom of expression does not include a guarantee that an individual must be able to offer his or her opinion in a specific forum. In the words of the Court:[103]

> Freedom of expression is the bulwark of all fundamental freedoms and always the

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[101] *Supra* n. 77.

[102] *Supra* n. 99, ss.2(b) and 6.

[103] *Supra* n. 100 at 165-166.

> first to be repressed or controlled by totalitarian regimes. Its inclusion in the *Canadian Charter*, as in the other human rights documents referred to, is a safeguard against repression and control by ruling authority. Article 2(b) of the *Canadian Charter* guarantees that no government in Canada will act to abridge or abrogate that freedom.
>
> Viewed in this perspective, it becomes immediately and abundantly clear that the expression of opinion sought by a plebiscite under the *Plebiscite Ordinance* has nothing at all to do with the fundamental freedom of expression guaranteed by the Canadian Charter. It does not abridge or abrogate the fundamental freedom of expression previously enjoyed by the applicants as a guaranteed birthright. It is a supplementary forum created by the Territorial Government for its own information purposes. The fact that the applicants were denied the opportunity to participate in a public opinion poll did not detract from their fundamental right to speak out and express their views on the subject matter, whether individually or through the media.

In brief, therefore, the Court found that the freedom of expression contemplated in section 2(b) of the *Charter* does not necessarily include the right to vote in a government initiated plebiscite or referendum.

With respect to the issue of mobility rights, the applicants argued that residency provisions of the *Plebiscite Ordinance* discriminated against them on the basis of their province of previous residence, contrary to section 6(3) of the *Charter*. In rejecting this proposition, the Court of Appeal concluded that section 6(3) applied only where, on the basis of province of previous residence, a law infringed upon an individual's ability to move to, take up residence in, or pursue a livelihood in any other province. In the case at bar each of the applicants had successfully moved to and had taken up residence in the Northwest Territories and was pursuing a livelihood within the Northwest Territories "notwithstanding any disadvantage which he or she may suffer under the *Plebiscite*

Ordinance".[104] Accordingly, the Court found that the mobility rights of the applicants had not been violated.

(ii) ***Haig et al.*** **v.** ***Canada***[105]

In this case, the Supreme Court of Canada was called upon to determine the constitutionality of certain provisions of the federal *Referendum Act*[106] and the *Canada Elections Act*[107] which governed the 1992 vote on the Charlottetown Accord. The case was brought before the Court by Graham Haig, an individual who had moved from Ontario to Quebec shortly before the 1992 direct vote took place. Because of the timing of his move to Quebec and the eligibility provisions of the federal statutes, Haig was prohibited from participating in the national vote and he accordingly brought an action for declaratory relief and *mandamus* enabling him to cast a ballot on the Accord.[108]

As noted earlier, the national vote on the Charlottetown Accord was governed by provincial legislation in Quebec and by federal legislation elsewhere in the country.

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[104] *Ibid.* at 167.

[105] (1993) 156 N.R. 81 (S.C.C.).

[106] *Supra* n. 46.

[107] R.S.C. 1985, c. E-2.

[108] Note that Haig's arguments dealt only with the validity of the federal referendum legislation. Haig did not challenge the constitutionality of the Quebec legislation.

According to the Quebec legislation,[109] residents of the province were eligible to vote in Quebec only if they were Canadian citizens who had been domiciled in the province for at least six months prior to the polling date. Under the federal legislation,[110] eligible voters outside of Quebec included only those Canadian citizens who, on the enumeration date, were ordinarily resident within one of the polling divisions established for the national vote. Unfortunately, because of his move to Quebec a short time before the vote, Haig did not meet the eligibility requirements of either of the Quebec or the federal legislation. He was not ordinarily resident outside of Quebec on the enumeration date and he had not been living in Quebec for six months prior to the polling date. The result of this situation was that Haig was not enumerated by either the Quebec or the Canadian governments and consequently was unable to vote in either jurisdiction.

In order to obtain a court order enabling him to vote on the Charlottetown Accord, Haig argued that the *Canadian Charter of Rights and Freedoms* guaranteed him the right to vote in the referendum and that he had been wrongly denied of this right. Haig's argument was divided into three main contentions: first, that the eligibility requirements set out in the federal legislation violated his right to freedom of expression under section

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[109] For legislation affecting Quebec's referendum, see: *Election Act*, R.S.Q. 1977, c.E-3.3; *An Act Respecting the Process for Determining the Political and Constitutional Future of Quebec*, *supra* n. 50, c.34; *An Amendment Act Respecting the Process for Determining the Political and Constitutional Future of Quebec*, S.Q. 1992, c. 47; *Referendum Act*, *supra* n. 77.

[110] For the applicable federal legislation, see: *The Referendum Act*, *supra* n. 46 and *The Canada Elections Act*, *supra* n.107.

2(b) of the *Charter*; second, that the eligibility requirements set out in the federal legislation violated his right to vote under section 3 of the *Charter*; and finally, that the eligibility requirements of the federal legislation unfairly discriminated against him contrary to section 15 of the *Charter*. After detailed consideration of each of Haig's submissions (resulting in written judgments being provided by five Supreme Court Justices), the majority of the Supreme Court of Canada rejected all of these arguments and concluded that Haig's rights had not been violated.

The first step in the Court's consideration of Haig's arguments was to evaluate the purpose and effect of the federal legislation to see if it was capable of bearing an interpretation which would provide Mr. Haig with a right to vote in the federal referendum. In this regard, the Court noted that, rather than requiring a vote to be held across the country, the enabling provision of the *Referendum Act* authorized the Governor-in-Council to put a question to all the electors of Canada or to the electors of one or more provinces of Canada. Because the legislation therefore authorized public consultation on a national, provincial or multi-provincial basis, the Court concluded that the purpose of the *Referendum Act* was not necessarily to obtain the opinion of electors in all Canadian provinces at the same time. In the opinion of the majority of the Court, the federal legislation therefore contemplated the possibility that some electors might be left out of the voting process and the residency requirements imposed on electors in the 1992 direct vote only served to give effect to this possibility. In reaching this conclusion, the Court relied heavily on the fact that, from the federal perspective, the

1992 vote was to obtain the opinion of Canadians living outside of Quebec; the question in Quebec was governed by Quebec legislation and legally constituted a separate provincial vote. As summarized by Justice L'Heureux-Dubé:[111]

> . . . the appellants rely on the incorrect assumption that *all* Canadians were entitled to vote in *this* federal referendum, and that the question of where one actually casts one's ballot was a purely technical matter. This is clearly not so. Two distinct referenda were held. The federal referendum was held in nine provinces, and two territories. The entitlement to vote in this referendum was tied to ordinary residence in one of these jurisdictions on the enumeration date. The spirit of the Act was clearly to extend an entitlement to vote *only* to those people ordinarily resident in a jurisdiction specified by proclamation. It would go directly against this spirit and intent to find otherwise.
>
> It is critical to appreciate that residency is *not* a purely technical matter, but is a fundamental aspect of the referendum scheme itself.

The majority of the Court also noted that, given the unambiguous terms of the federal legislation's residency requirement, the Chief Electoral Officer did not have any authority to permit Haig to vote despite his non-compliance with this requirement.

With respect to Haig's contention that his inability to vote on the Accord violated his freedom of expression, the Court summarized Haig's position as follows:[112]

> Mr. Haig also claims that the fact that he could not vote in the federal referendum infringed his freedom of expression. Expressing one's opinion on the

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[111] *Supra* n. 105 at 110.

[112] *Ibid*. at 122.

> Charlottetown Accord, according to Mr. Haig, is an attempt to convey meaning, the content of which related to political discourse, which is at the core of s. 2(b) of the Charter and enjoys the highest degree of protection. The content of this expression, he says, cannot be meaningfully examined apart from its form, namely, participation in the referendum itself. Consequently, he urges the court to find that the actual *casting of a ballot* in a federal referendum is a protected form of expression, asserting that s. 2(b) of the *Charter* mandates not only immunity from state interference, but also an affirmative role on the part of the state in providing this specific means of expression.

Accordingly, the question before the Court was whether section 2(b) of the *Charter* guarantees to all Canadians the right to participate in a direct vote and, if so, whether Haig was wrongly deprived of this right.

After a somewhat lengthy consideration of the theory behind the Charter's guarantee of freedom of expression, the majority of the Court ultimately reiterated the finding in the *Allman* case by concluding that, while there may be some circumstances in which a court might properly conclude that the freedom of expression imposes a positive duty on a government to facilitate public expression, a referendum does not fall within this context. In the view of the majority of the Court, section 2(b) of the *Charter* does not include the right to vote in a referendum:[113]

> A referendum is a creation of legislation. Independent of the legislation giving genesis to a referendum, there is no right of participation. The right to vote in a referendum is a right accorded by statute, and the statute governs the terms and conditions of participation. The court is being asked to find that this statutorily created platform for expression has taken on constitutional status. In my view,

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[113] *Ibid.* at 132.

> though a referendum is undoubtedly a platform for expression, s. 2(b) of the *Charter* does not impose upon a government, whether provincial or federal, any positive obligation to consult its citizens through the particular mechanism of a referendum. Nor does it confer upon all citizens the right to express their opinions in a referendum. A government is under no constitutional obligation to extend this platform of expression to *anyone*, let alone to *everyone*. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law.

Given this characterization of referendum legislation, the Court found that the federal government did not violate s. 2(b) of the *Charter* by holding the 1992 direct vote in less than all provinces or by providing residency requirements for potential voters.

It should be noted that the finding of the majority of the Court with respect to the freedom of expression issue appears closely tied to the majority's opinion that, since the province of Quebec was conducting its own direct vote on the Charlottetown Accord, the referendum governed by the federal legislation was not really intended to be a national or country-wide vote. This reasoning suggests that, if a truly national referendum had been intended, Haig may have been able to successfully rely upon his right to freedom of expression to ensure that he was able to cast a ballot. In his dissenting judgment, Justice Iacobucci concluded that, despite the fact that the vote in Quebec was subject to Quebec law, the intention of the federal government had been to obtain a cross-country response to the Charlottetown Accord. In light of this finding, Justice Iacobucci held that section 2(b) of the *Charter* did offer Haig a constitutionally protected right to vote in the referendum:[114]

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[114] *Ibid.* at 164.

> Casting a referendum ballot is an important form of expression which is worthy of constitutional protection. In my view, the appellant Haig's right to express his political views by participating in the referendum was guaranteed by s. 2(b) of the *Charter*. He was denied the right to participate and thus his s. 2(b) rights were violated.
>
> . . .
>
> While the purpose of the *Referendum Act* was to include all voters, the effect was to deprive those residents of Quebec who were ordinarily resident in another province in the six-month period prior to the referendum of the ability to participate in expressive activity which is clearly protected under the *Charter*.

Therefore, while this case clearly establishes that the freedom of expression does not require the government to conduct a direct vote, there still may be some scope for arguing that, where the Canadian government decides to hold a direct vote which is truly of a national scope, the right of a Canadian citizen to participate in that vote is guaranteed by section 2(b) of the Charter.[115]

Turning to Haig's contention that the federal legislation's residency requirements violated his right to vote as guaranteed by section 3 of the *Charter*, the Court focused on the purpose and the scope of the right defined within this section. In this regard, noting that the wording of section 3 is quite narrow in that it refers only to the right of Canadian citizens to vote "in an election of members of the House of Commons or of a legislative assembly",[116] the Court concluded that the purpose of section 3 is to provide Canadian citizens with the right to "play a meaningful role in the selection of elected representatives."[117] Accordingly, the Court held that, while section 3 confers a duty on federal and provincial governments to hold regular elections, this section does not require either order of government to conduct direct votes. In support of this finding, the court identified several important differences between a direct vote and an election:[118]

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[115] A fact which was not raised in this case, but which came to light sometime after the court hearing, was that, prior to the 1992 vote being held, the federal government had agreed to pay Quebec's referendum costs. It is arguably that this fact suggests that the federal government did intend for the vote on the Charlottetown Accord to be a national vote. *Query* whether the decision of the Supreme Court would have been different if this fact had been brought before the court.

> A referendum . . . is basically a consultative process, a device for the gathering of opinions. Voting in a referendum differs significantly from voting in an election. First, unless it legislatively binds itself to do so, a government is under no obligation to consult its citizens through the mechanism of a referendum. It may, as did Quebec under Bill 150, bind itself to conduct a specific referendum but, in the absence of such legislation, there is no obligation to hold this type of consultation. Second, though a referendum may carry great political weight and a government may choose to act on the basis of the results obtained, such results are non-binding in the absence of legislation requiring a government to act on the basis of the results obtained. In the absence of binding legislation, the citizens of this country would not be entitled to a legal remedy in the event of noncompliance with the results. Were a government to hold a referendum and then ignore the results, the remedy would be in the political and not the legal arena. These differences provide further evidence that the constitutionally guaranteed right to vote does not contemplate the right to vote in a referendum.

Given this reasoning, the majority of the court concluded that Haig's rights under section 3 of the Charter were not violated by the fact that he was prevented from voting on the

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[116] *Supra* n. 99, s. 3.

[117] *Supra* n. 105 at 120.

[118] *Ibid*. at 121.

Charlottetown Accord.

With respect to Haig's allegation that his inability to vote in the referendum discriminated against him in violation of section 15 of the *Charter*, the Court conceded that, while neither section 2(b) nor section 3 of the *Charter* imposed a duty on the government to hold a direct vote, once the government decided to conduct such a vote, it was obligated to do so in a manner which did not discriminate against any individual on a ground prohibited by section 15 of the *Charter*. While further acknowledging that the residency requirements of the federal legislation differentiated between individuals on the basis of their place of residence, however, the Court concluded that, in the circumstances, this differentiation did not fall within the realm of discrimination contemplated in section 15 of the *Charter*. In the words of the Court:[119]

> A complainant under s. 15(1) must establish that he or she is a member of a discrete and insular minority group, that the group is defined by characteristics analogous to the enumerated grounds of discrimination set out in s. 15(1) and that the law has a negative impact.
>
> . . .
>
> Against this background, the appellants submit that a person's *place of residence* may be a personal characteristic which is analogous to those prohibited grounds listed in s. 15(1). Though this may well be true in a proper case, this case is *not* such a case. It would require a serious stretch of the imagination to find that *persons moving to Quebec less than six months before a referendum date* are analogous to persons suffering discrimination on the basis of race, religion or gender. People moving to Quebec less than six months before a referendum date do not suffer from stereotyping, or social prejudice. Though its members were

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[119] *Ibid*. at 136.

> unable to cast a ballot in the Quebec referendum, the group is not one which has suffered historical disadvantage or political prejudice. Nor does the group appear to be 'discrete and insular'. Membership in the group is highly fluid, with people constantly flowing in or out once they meet Quebec's residency requirements. As they do not exhibit any of the traditional indicia of discrimination, I cannot find that new residents of a province constitute a group which merits the creation of a new s. 15(1) category.

Having therefore concluded that the residency requirements in the federal referendum legislation did not violate section 15 of the *Charter*, the Court went on to consider whether section 15 was violated by the fact that the federal government excluded the province of Quebec from its referendum and permitted the Quebec referendum to be conducted pursuant to provincial legislation. In this regard, the majority of the Court noted the importance of the different orders of government within the Canadian federation and once again concluded that section 15 had not been violated by the differential treatment of the residents of one province:[120]

> Clearly, in a federal system, province-based distinctions do not automatically give rise to a presumption of discrimination. Section 15(1) of the *Charter*, while prohibiting discrimination, does not alter the division of powers between governments, nor does it require that all federal legislation must always have uniform application to all provinces. . . differential application of federal law in different provinces can be a legitimate means of promoting and advancing the values of a federal system. Differences between provinces are a rational part of the political reality in the federal process. Difference and discrimination are two different concepts and the presence of a difference will not automatically entail discrimination.
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> . . .

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[120] *Ibid*. at 140.

> The decision to hold a referendum in a specific number of provinces is a constitutionally permissible exercise of the discretion accorded to the government under s. 3(1) of the *Referendum Act (Canada)*. The fact that the legislature decided not to hold a referendum in the Province of Quebec did not violate the constitutional guarantees contained in s. 15(1) of the *Charter*.

In summary, then, just as in the *Allman* case, the *Haig* decision clearly establishes that the *Charter of Rights and Freedoms* does not provide Canadians with a constitutionally entrenched right to participate in direct votes. Further, while this decision also indicates that any direct vote which is conducted by the government must comply with the tenets of the *Charter*, the approach taken by the judges in the *Allman* and the *Haig* cases suggests that the Courts will not easily conclude that a *Charter* violation has occurred where the legislation's residency requirements have excluded an individual from voting. Finally, the reasoning of the majority of the Court in the *Haig* decision also clearly illustrates the Court's view that direct votes and the ability of citizens to cast ballots in direct votes are not as revered by or as critical to the Canadian democractic process as elections for government representatives and the capacity of Canadians to participate in these elections.

V. CONCLUSIONS: THE LESSONS OF HISTORY AND THE CURRENT STATE OF DIRECT VOTING IN CANADA

Based on the preceding discussion, it is clear that direct voting is not unknown in Canada as a legislative tool, although this country's national direct voting experience has been very limited. To date, national direct votes have been held largely for political purposes and their use has generally met with considerable opposition. In the three instances where national direct votes have been held, however, they have played a significant role in helping the government to deal with controversial issues.

For most of its history, Canada has not had standing federal legislation enabling direct votes to be held even though such legislation has been common within the provinces. This situation was rectified with the passage of 1992's *Referendum Act*. This statute remains in existence today and enables a national direct vote to be held at the discretion of the federal cabinet on constitutional matters. The Canadian people, then, are still not statutorily empowered to force a national direct vote on any issue.

Finally, to date it does not appear that the Canadian courts have been very helpful in advancing the cause of national direct votes. On the contrary, the courts have refused to recognize any constitutionally guaranteed right of the people to participate in national direct votes and have warned that any statutes enabling direct votes to be held must strictly comply with the division of powers set out in the Canadian constitution. Accordingly, thus far the courts seem to be reiterating the central theme of Canada's current *Referendum Act*: namely, that national direct votes in Canada are strictly creations of statute and remain within the exclusive control of the Canadian government and not the Canadian people.

CHAPTER FOUR

SHOULD DIRECT VOTING BE USED AS A NATIONAL LAWMAKING TOOL IN CANADA?

As illustrated in the previous chapter, national direct votes in Canada have historically functioned primarily as pragmatic, political tools. Each of the national referendums held in this country to date has been instigated by the government as a means of dealing with a particularly controversial and divisive issue. Thus, Canada's referendum experience does not reflect any particular ideological view of direct democracy, but instead demonstrates a somewhat *ad hoc*, reluctant use of direct voting measures to further political objectives.

Canada's history of debating the idea of national direct voting on an issue-by-issue basis has often caused the merits of direct voting to be confused with the merits of the question to be voted upon--resulting in little, if any, objective analysis of the concept of national direct voting itself. In order to rectify this problem and to achieve a less pragmatic and more principled approach toward direct democracy in this country, the role of national direct voting as a lawmaking tool must be analyzed on its own, without being associated with any particular voting topic. Accordingly, the purpose of this chapter and the following chapter is to provide such an "issue neutral" analysis of the future prospects for national direct voting in Canada.

In order to determine what role national direct voting can and should play in Canada's future, two main questions must be answered:

1. Should direct voting be utilized as a national lawmaking tool in Canada?

2. If direct voting is utilized as a national lawmaking tool in Canada, what legal requirements and restrictions can and should govern its use?

The first question, which will be dealt with in the present chapter, focuses on the desirability of conducting national direct votes in Canada. In order to answer this question, this chapter will identify the most common philosophical and ideological arguments raised in favour of and in opposition to direct voting measures and will evaluate these arguments in light of Canada's national referendum experience to date as well as the direct voting experience of other western democracies.[1] The second question, which will be discussed in the next chapter, deals with establishing appropriate legal parameters for the use of national direct votes. For the purposes of this paper, the discussion of this issue will focus on the constitutional and legislative role which direct voting can and should play in Canada. For the reasons set out in Chapter I,[2] practical concerns regarding the implementation of direct voting measures (such as framing a fair referendum question and controlling campaign financing) will not be discussed.

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[1] The western democracies referred to are those whose direct voting experiences are discussed in Chapter II.

[2] See Chapter I, p. 5.

SHOULD CANADA USE NATIONAL DIRECT VOTES AS A LAWMAKING TOOL

I. IDENTIFYING THE ISSUES

At the heart of every debate over the merits of direct voting lies the notion of democracy.[3] Generally, supporters of direct voting advocate referendums, plebiscites and initiatives as mechanisms for more fully involving ordinary citizens in the legislative process and thereby increasing the democratic character of society. In contrast, critics of direct voting typically question the need to make representative government systems more democratic and, focusing on the potential problems which may be associated with direct voting mechanisms, challenge the wisdom of trying to make representative government systems more democratic in light of these hazards. These opposing arguments regarding the relationship between direct voting mechanisms and democracy raise four main issues with respect to the appropriate role for national direct votes in Canada:

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[3] Obviously, the term "democracy" can involve a number of complex ideas and is itself worthy of lengthy discussion and definition. For purposes of this paper, "democracy" is defined, in accordance with most introductory political science texts, simply as "government by the people."

(a) Is it desirable for Canada to become a more democratic nation?

(b) Would the use of national direct votes make Canada a more democratic country and, if so, how? In other words, would national direct votes make our country more democratic than our current representative lawmaking system?

(c) What are the potential problems or costs, if any, associated with the use of national direct votes?

(d) How do the problems or costs associated with the use of national direct votes balance against any democratic benefits achieved through the use of such votes? That is, is a national lawmaking system which includes direct voting measures preferable to our current representative system, particularly in this technologically advanced age?

For the purposes of the present discussion, it will be assumed that democracy is a desirable form of government and that the first of the above issues must therefore be answered affirmatively. This assumption is made in the belief that Canadians generally favour democracy over other government systems and that, aside from any costs or potential risks involved, the majority of Canadians would support the prospect of increasing the country's democratic character. Further, this assumption seems to be consistent with the current national desire for greater recognition and involvement of the people in our political system.[4] In light of this assumption, then, this chapter will deal only with the remaining three issues identified above. Rather than dealing with whether Canada's national lawmaking system should be more democratic, these issues focus on *how* democratic Canada's national lawmaking systems should be in light of the perceived benefits and the potential costs commonly associated with direct voting as well as the technology available and required for direct votes to take place.

II. THE CASE FOR NATIONAL DIRECT VOTES

A. The Argument Favouring National Direct Votes - Summary

As noted above, the main argument raised by proponents of direct voting is that direct votes increase the democratic character of society by enabling citizens to become more fully involved in the legislative process. Obviously, the main tenet of this argument is that, because direct voting mechanisms provide citizens with their own voice and vote on individual legislative issues, legislative systems which incorporate these mechanisms come closer to achieving true "government by the people" than representative government systems. In support of this contention, advocates of this argument emphasize the effect which direct voting measures have in empowering the people, legitimizing legislation, and increasing public awareness of legislative matters.[5]

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[4] See Chapter I.

With respect to the empowerment of the people, supporters of direct voting argue that direct votes increase the democratic character of society by providing citizens with a greater degree of legislative sovereignty than they enjoy in a purely representative government system. Underlying this argument is the belief that many of the elements of a purely representative government system (such as political parties, lobby groups and political personalities) often unduly influence public opinion on critical issues and discourage popular involvement in the lawmaking process, thereby preventing or inhibiting the ability of ordinary citizens to affect the content and focus of legislation to the extent contemplated by traditional democratic theory. Additionally, this argument is based on the idea that, even when elected by a large majority, a representative government does not necessarily have a popular mandate to legislate on every issue or to change its position on a given issue without consulting the people.[6] Direct voting, then, is seen as a means of resolving these problems by ensuring that ordinary citizens can influence the legislative process by voting on issues rather than voting only for individuals:[7]

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[5] These arguments are identified and discussed in varying degrees by various authors. For example, see: G. Q. Walker, "The People's Law: Initiative and Referendum", (1988) 15 *University of Queensland Law Journal*, 33 at 35-36; J. F. Zimmerman, *Participatory Democracy: Populism Revived* (1986) at 90-91 and 96-97; T.E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum and Recall* (1989) at 10-11; J.P. Boyer, *The People's Mandate: Referendums and a More Democratic Canada* (1992) at Chapter 3; J.P. Boyer, *Lawmaking by the People: Referendums and Plebiscites in Canada* (1982) Chapter 4; H. Hahn & S. Kamieniecki, *Referendum Voting: Social Status and Policy Preferences* (1987) at 16-18; and V. Bogdanor, *The People and the Party System: The Referendum and Electoral Reform in British Politics* (1981) at 84-85.

[6] For a thorough discussion of the question of an elected government's mandate in the context of direct democracy issues, see Boyer, *The People's Mandate*, *supra* n. 5, Chapter 5.

> [The direct voting system] gives back to the people the real power to determine the laws under which they live, a power that is rightly theirs but has been usurped by party machines and by pressure groups. Initiative and referendum force politicians to take more notice of the values and opinions of the people, because unpopular legislation rammed through parliament can be promptly overturned by the people's veto.

With respect to the legitimization of legislation, proponents of direct voting argue that direct votes provide the greatest degree of legitimization of legislation by enabling the people to effectively demonstrate their views on given issues and by ensuring that existing legislation reflects these views. This argument, closely linked with the popular sovereignty issue discussed above, again suggests that direct voting mechanisms act as a check on the representative government system by providing a means for the public to override the decisions of elected legislators between elections. A further critical component of this legitimization argument is the notion that, while direct votes cannot be practically conducted with respect to every legislative question, there are some fundamental matters which require the express consent of the people. These matters are typically identified as relating to the creation and maintenance of the country's political and legal systems, therefore including constitutional questions or other issues affecting national sovereignty. While general elections sometimes address these issues, proponents of direct voting note that many factors may influence voters' decisions when choosing representatives such that the outcome of general elections cannot be relied upon to give a clear or accurate picture of voter preferences on a given legislative issue.

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[7] Walker, *supra* n. 5, at 35-36.

Finally, with regard to increasing public awareness, advocates of direct voting note that direct votes often serve an educational function: stimulating public awareness of critical issues, raising interest in legislative matters and generally enhancing public participation in the legislative process. Reflected in this argument is the belief that public apathy with regard to legislative matters stems at least in part from the failure of representative government systems to inspire the public to become aware of legislative issues. Proponents of this belief suggest that, when voters are denied the opportunity to vote directly on policy matters, many voters only inform themselves on these matters immediately prior to a general election, if at all. On the other hand, if given the opportunity to vote directly on legislative matters, people wishing to cast a ballot will take this responsibility seriously and become informed about the issues at hand. Further, it is argued that the public campaigns which ordinarily precede a direct vote provide a ready means for the populus to become educated on important legislative questions.

B. The Argument Favouring National Direct Votes - Analysis

From a purely theoretical perspective, it is difficult to challenge the notion that direct voting mechanisms increase the democratic character of society by emphasizing the power of the people, enhancing the legitimization of legislation and contributing to the education of the public. Because direct votes enable citizens to participate in legislative decision-making on an issue-by- issue basis, it is a virtual truism that a country whose laws can be enacted by direct votes will be more democratic than a nation whose laws depend entirely upon a representative government system.[8] In practice, however, this conclusion is dependent upon at least two fundamental assumptions:

(i) that the people will actually participate in a national direct vote if given the opportunity, and

(ii) that, once the people have expressed their collective opinion through a direct vote, that opinion will be reflected in the existence or the absence of legislation.

Unfortunately, these assumptions are not always borne out when direct votes take place.

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[8] Along with the entirety of this paper, this conclusion in particular refers only to direct votes which are used appropriately and in good faith to determine the will of the people. Accordingly, this conclusion does not take note of direct voting processes historically used by dictatorships or totalitarian regimes to give the appearance of popular support for their legislative undertakings. Furthermore, this conclusion assumes that voters in a direct democracy have the same degree of free access to information on both sides of the issues being voted upon as is available to elected legislators in a representative government system.

With respect to the first assumption, it is obvious that the democratic benefits associated with direct voting mechanisms can only be realized if these mechanisms are actually utilized by the public. In order to have increased "government by the people", the people must participate in the act of governing. In reality, however, the existence of direct voting opportunities does not necessarily result in widespread participation in these votes. For example, public apathy in direct votes is readily seen in Switzerland, where participation in direct votes is generally quite low despite the frequent opportunities for such participation.[9] While the right to participate in a direct vote may include the right to abstain from voting, the extent of voter participation in direct votes remains relevant when considering whether direct voting mechanisms increase the democratic character of an otherwise representative government system. Although direct voting mechanisms may provide the opportunity for increased democratic benefits, these benefits cannot materialize in reality unless public participation in the direct votes at least equals public participation in the election of legislative representatives. If fewer people vote on a given referendum issue than in a general election, it may be argued that the national will with respect to the issue in question might be better reflected by the decision of the elected representatives.

With respect to the second assumption identified above, it once again appears clear that the democratic benefits associated with direct voting can only be fully realized if the public opinions expressed through direct votes are acted upon by the government. As illustrated by Canada's national referendums on prohibition and conscription, where direct votes are not binding on the government the results of these votes may not be reflected in legislation and may be used primarily for political, rather than legislative, purposes.[10] In such circumstances, while direct votes may contribute to public education, they certainly do not increase the sovereignty of the people or the legitimacy of legislation. Further, although the political response to the result of a non-binding direct vote may sometimes be the same as the legislative response which would have been required if the vote was binding,[11] this type of coincidence should not be relied upon to support the general contention that direct votes increase a nation's democratic character. Because only binding direct votes require a legislative response consistent with the voting results, only binding direct votes can properly be said to increase a nation's democratic character. Far from giving more power to the people, non-binding direct votes leave all of the legislative power in the hands of elected representatives.

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[9] See Chapter II, Section III.

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[10] See Chapter III, Section I.A and I.B.

[11] This was the case, for example, with the Canadian vote on the Charlottetown Accord where, despite the fact that the popular vote was not legally binding, the government decided to adhere to the view expressed by the Canadian people and not enact the provisions of the Accord. See Chapter III, Section I.C.

II. THE CASE AGAINST NATIONAL DIRECT VOTES

A. The Arguments Against National Direct Votes - Overview

Generally speaking, opponents of national direct voting in Canada do not usually challenge the proposition that direct voting mechanisms increase the democratic character of society. Instead, focusing on one or more problems which they associate with the use of direct votes, critics of direct voting typically argue that the costs related to direct votes exceed any democratic benefits which such votes may offer. These arguments are not totally silent on the value of democracy, however, in that many of the problems identified by direct voting critics seem to indirectly question the populist basis of democracy itself, often exhibiting a fundamental distrust of the people and a perceived need to limit the role of the common man in the lawmaking process. Accordingly, while the arguments typically relied upon by opponents of direct voting usually fall short of directly questioning the value of democracy, these argument always ask how much value we are willing to place on democracy given the associated costs.

As one might expect, the specific problems linked to direct voting have historically varied with the times and with the personalities involved. Still, a number of concerns seem to consistently recur among direct voting critics. Among the most common of these recurrent concerns are the following:[12]

1. That direct votes are inconsistent with representative government and the sovereignty of Parliament;
2. That the general public lacks the specialized knowledge necessary to make legislative decisions;
3. That direct votes may result in the oppression of minorities;
4. That direct votes are divisive;
5. That direct votes do not lead to clear legislative results; and,
6. That direct votes on some issues may lead to direct votes being held on all matters.

Although these concerns are to some extent interrelated, in order to determine the extent to which these problems are accurately associated with direct voting, each of these concerns must be considered individually.

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[12] Some or all of these problems are identified and discussed in several sources, including the following: Boyer, *The People's Mandate*, *supra* n. 5; *The Referendum Device*, (A. Ranney, ed., 1981); Hahn & Kamieniecki, *supra* n. 5; Bogdanor, *supra* n. 5; J. Grimmond & B. Neve, *The Referendum* (1975); S. Alderson, *Yea or Nay?: Referendum in the U.K.* (1975); Cronin, *supra* n. 5; L. Tallian, *Direct Democracy* (1977); Walker, *supra* n. 5; Boyer, *Lawmaking by the People*, *supra* n. 5; Zimmerman, *supra* n. 5; E.C. Lee,"Can the British Voter Be Trusted?" (Summer, 1988) 66 *Public Administration* 165; K. Hanly, "Constitutional Initiatives & Referenda: Only in Switzerland, You Say? Pity!" (September 1992) 13:7 *Policy Options* 19; P.F. Gunn, "Initiative & Referendums: Direct Democracy and Minority Interests" (1981) 22 *Urban Law Annual* 135; D.B. Magleby, "Take the Initiative", (Summer, 1988) 21 *PS* 600; R. Whittaker, *Sovereign Idea: Essays on Canada as a Democratic Community* (1992).

B. The Arguments Against National Direct Votes - Summary & Analysis

1. Direct Votes are Inconsistent with Representative Government and the Sovereignty of Parliament

One of the most common criticisms of direct votes is that they are inconsistent with systems of representative government and, particularly, with the principle of Parliamentary Sovereignty because they transfer legislative power from elected representatives to the public. This view claims that direct democracy conflicts with representative government by enabling elected representatives to abdicate their legislative responsibilities to the public and to evade difficult policy issues by leaving these matters to the people. Further, this view suggests that direct votes threaten the structure of representative democracy by enabling legislative decisions to be made outside of the scope of party politics or established political channels. Finally, this argument indicates that direct democracy is inconsistent with Parliamentary Sovereignty because direct votes enable the public to make legislative decisions different from those supported by Parliament, potentially permitting the public to enact laws which Parliament refuses to pass or to repeal laws that Parliament does enact.

At first glance, direct votes may seem to be inconsistent with the operation of a Parliamentary democracy as the above argument suggests. While direct voting mechanisms allow legislative decisions to be made by the general public, our

Parliamentary government system envisions such decisions being made primarily under the direction of an elite cabinet. Despite this *prima facie* difference in perspective, however, direct votes in reality do not necessarily pose a serious theoretical or practical threat to the operations of our representative government system or to the principle of Parliamentary sovereignty.

From a theoretical perspective, it must first be remembered that the fundamental feature of a democracy is that legislative power ultimately rests with the people. In a representative democracy, the people have delegated this power to a few elected officials. Accordingly, instead of being a transfer of power from elected representatives to the people, direct votes actually constitute a withholding of the people's power from elected representatives. Second, it should be noted that part of the role of an elected government is to listen to the people and to represent their interests. Accordingly, rather than allowing elected representatives to abdicate their legislative responsibilities, direct votes arguably enable government members to better fulfill these responsibilities by being directly informed as to the public's opinion on certain matters.[13] Further, since a fundamental purpose of a representative government system is to ensure that the interests of the majority of the public are properly represented, this purpose is apparently fulfilled, and not undermined, by allowing the public to vote directly on some issues.[14] Finally, direct voting measures do not necessarily threaten Parliamentary Sovereignty because the decision to pass legislation permitting direct votes must itself be initially made by Parliament and may be revocable by Parliament. Any potential threat to Parliamentary Sovereignty is further diminished if Parliament alone is involved in determining which issues are sent to a popular vote.

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[13] Boyer, *The People's Mandate*, *supra* n. 5, at 181-182.

[14] Bogdanor, *supra* n. 5, at 77-78.

From a practical perspective, the direct voting experience of many western democracies further supports the contention that direct votes do not pose a serious threat to representative government systems or to the principle of Parliamentary Sovereignty. Generally, the experience of these countries demonstrates that, for legislative purposes, direct voting mechanisms and representative government systems can coexist and even complement one another. In most western democracies, the availability of direct voting mechanisms has not made the use of direct votes so prevalent as to usurp the legislative role of elected representatives and the occasional employment of direct votes "does not seem to have subverted parliamentary sovereignty in any cumulative way in the major countries preserving the Westminster model."[15] In fact, in most western Parliamentary democracies, direct votes have been held on matters on which the government had already legislated and for which public ratification was being sought by the government. Thus, in countries where the Westminster Parliamentary system is relied upon (including Canada, the United Kingdom and Australia), direct voting measures have typically been used as a conservative check on controversial government proposals rather than as a means of forcing revolutionary laws through Parliament.[16] This use of direct democracy as a shield rather than as a sword suggests that many of the fears of direct democracy usurping the role of elected representatives and of Parliament are largely unfounded in reality.[17]

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[15] Ranney, *supra* n. 12, at 81.

Finally, when considering the effect which direct votes may have on the sovereignty of Parliament, it must be remembered that, even without the introduction of direct voting mechanisms, the modern day operation of Parliament does not strictly adhere to the traditional principle of Parliamentary sovereignty. As one writer notes:[18]

> This traditional British concept of sovereignty has, to be sure, its own antiquarian charms. Yet even in England this ancient Whig notion has about as much relevance to the real world of today as the pomp of a royal wedding has to Britain's industrial decay. The rise of universal suffrage, political parties organizing the mass electorate, executive domination of policy making, and other familiar aspects of twentieth-century life have emptied the concept of its original content.

Accordingly, even if one acknowledges a philosophical inconsistency between direct voting and Parliamentary sovereignty, this inconsistency is unlikely to have any significant practical effect if direct voting mechanisms are employed as part of our legislative system.[19]

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[16] See Chapter II, Sections I and II and Chapter III.

[17] Bogdanor, *supra* n. 5, at 69.

[18] R. Whittaker, *supra* n. 12, at 215-216.

2. The General Public Lacks the Specialized Knowledge to Make Legislative Decisions

Another prevalent criticism of direct democracy stems from the belief that lawmaking is a complicated process, requiring legislators to have detailed knowledge of contemporary social and economic issues. Proponents of this belief argue that the general public lacks the degree of expertise and knowledge required to make wise legislative choices and that these decisions should, therefore, be left to elected representatives who have or are able to obtain specialized knowledge of legislative issues. According to this view, if given the opportunity to vote on legislative questions the public will behave in an ill-informed and irrational manner, either voting on the basis of emotion, voting on a single issue without giving due consideration to the wider legislative context or to long term effects,[20] or voting in response to clever campaign tactics.[21] Ultimately, then, advocates of this view suggest that direct democracy may lead to frivolous or radical legislation resulting from the misjudgment of the public. Further, supporters of this view suggest that, because of the degree of knowledge necessary to make appropriate legislative decisions, at least some of the electorate will be intimidated by the issues and therefore refuse to cast a ballot in a direct vote, thereby making the result of the vote fall short of its democratic goal.[22]

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[19] Obviously, in keeping with the theme of this paper, these examples deal with direct voting measures which are used *within* a representative government system. If direct voting was used for all matters, it would by definition replace or usurp the role of elected representatives.

[20] Ranney, *supra* n. 12, at 83-84.

[21] Cronin, *supra* n. 5, at 64.

In evaluating the above argument, one must concede that legislative issues can be complicated and that, on the whole, elected representatives are probably more informed and knowledgable about these matters than the average citizen. The main problem with the above argument, however, is that it exaggerates the *degree* to which elected representatives may be more informed than the general citizenry on some issues. In reality, while elected representatives may develop some expertise on legislative matters, every member of Parliament certainly does not obtain an optimum amount of knowledge on every legislative proposal. On the contrary, elected representatives often have little personal knowledge or regard for the content of proposed legislation and cast their votes solely according to party policy. Further, while the above argument assumes that the general public can never attain the minimum degree of knowledge needed to make a reasoned decision on a specific matter, in actuality, direct votes and their accompanying campaigns frequently offer the public the incentive and the means to become informed on certain issues. Moreover, because direct votes usually address only one issue at a time, it has been suggested that the public may well become more informed on a given matter than elected representatives who have several legislative issues before them at any given moment.[23] In any event, with whatever information they gain about the issue under consideration, participants in direct votes certainly seem less likely to have their opinions disproportionately affected by party policy or special interest lobbyists than are elected representatives.

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[22] *Ibid.*, at 75-76.

With respect to the suggestion that direct votes lead to frivolous legislation, the direct voting experience of most western democracies provides little evidence to support this contention. In fact, the evidence shows that laws enacted by direct votes are not usually radically different from those enacted by elected representatives:[24]

> The fear that populist democracy via initiative, referendum and recall would lead to irresponsible, mercurial, or even bizarre decision making has not been borne out. The outcomes of direct democracy are similar to the outcomes of indirect democratic processes.

To the extent that direct voting processes can lead to drastically different conclusions than those reached by elected representatives, such results may only demonstrate that the elected lawmakers are not in tune with the wishes of the people they purport to represent. This lesson certainly was learned in Canada with the public's resounding rejection of the Charlottetown Accord which had been drafted and agreed upon by the country's elected representatives. Further, while ideally one of the roles of elected lawmakers is to provide the public with some leadership in the development and evolution of social values, in a democratic society this leadership role should not usurp or replace the judgement of the people. Moreover, there certainly is considerable scope for elected representatives to influence popular opinion during the campaigns preceding direct votes.

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[23] Gunn, *supra* n. 12 at 136.

[24] Cronin, *supra* n. 5, at 232.

Finally, while some uninformed voters may choose not to participate in direct votes, this lack of participation among a portion of the electorate does not necessarily lead to the conclusion that elected representatives are better legislators. Even where legislation is enacted by indirect methods, elected representatives often do not show up to vote unless there is some concern with the legislation passing. Further, although voter abstention may have some effect on the democratic benefits of the direct voting process,[25] if eligible voters choose not to vote because they are confused or burdened by the question at hand, then abstaining from voting may be a valid, responsible, and appropriate response, resulting in the delegation of responsibility to more informed citizens.[26] Additionally, a consistently large percentage of voter abstention (such as has been noted in Switzerland) may say more about the issues being brought to a direct vote than it says about the ability of the general public to vote on legislative issues.

Ultimately, when evaluating the legislative competence of the public versus that of the elected representative, it is important to remember that, regardless of who plays the legislative role, there will always be a discrepancy between the image of the ideal, textbook legislator and the real legislator.[27] While the ideal legislator is one who is fully informed about the issue in question, has objectively assessed all implications of the proposed legislation, and is able to unemotionally vote on the basis of the knowledge he or she has obtained, in reality legislators rarely, if ever, exhibit all of these qualities. The most logical conclusion seems to be that, while in some cases elected representatives may come close to the role of the ideal legislator, in other cases the general public may better approximate this standard. The legislative superiority of one group over the other depends upon an indeterminate number of factors, including most obviously the nature and importance of the issue at hand.

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[25] See Section II of this Chapter.

[26] Cronin, *supra* n. 5, at 209-210.

3. Direct Votes May Result in the Oppression of Minorities

Critics of direct democracy often argue that, because direct votes enable laws to be enacted at the will of the popular majority, these votes may result in the passage of legislation which oppresses minority rights or which is unresponsive to the interests of minority groups. In support of this proposition, opponents of direct voting emphasize the fact that referendums and initiatives generally measure only the number of votes cast for or against a proposed law and do not reflect the intensity of feeling behind those votes. Accordingly, while a minority of voters may be deeply interested in and affected by a given legislative question, the question may ultimately be determined by a majority

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[27] *Ibid.* at 230.

of voters who are comparatively uninterested or unaffected by the issue. Advocates of this view also argue that most participants in direct votes are members of the more affluent segments of society and are accordingly not typically concerned or knowledgeable about the needs of minority groups.

Undoubtedly, the oppression of minority interests is a potential hazard in any circumstance where decisions are based on the democratic principle of majority rule. Still, the direct voting experience of western democracies to date fails to support the notion that this danger is more prevalent where legislation is enacted as the result of a direct vote:[28]

> . . . the initiative and referendum record [USA] suggests that those direct democracy devices can only rarely be faulted for impairing the rights of the powerless. Even a general comparison of the results of ballot measures with those of legislators reveals that although both direct and representative lawmaking have occasionally diminished the liberties of the politically powerless, neither can be singled out as more prone to this tendency.

In fact, as previously noted, direct votes have not typically resulted in the type of revolutionary legislation apparently expected by some critics of direct voting:[29]

> Specifically, in relation to direct legislation, there does not appear to be a single recorded instance in which the initiative and referendum have been used in any state or country to enact legislation oppressing minority groups, to effect massive

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[28] *Ibid*. at 92.

[29] Walker, *supra* n. 5, at 40. See also Hanly, *supra* n. 12, at 20 and Cronin, *supra* n. 5, at 92 and 212.

> or uncompensated expropriations of property, to dissolve or persecute trade unions or to do any of the other extreme acts predicated by opponents.

On the contrary, direct votes have typically served a restraining role on the legislative process. The tendency of voters appears to be to vote against proposed changes unless they can clearly perceive a tangible benefit to these changes and, accordingly, "the expected threat of demagoguery has not materialized."[30] The general creed followed by participants in a direct vote seems to be "when in doubt, vote no."[31]

Finally, even if oppressive legislation was enacted in Canada as the result of a direct vote, it must be remembered that this legislation would be subject to the same constitutional and legal limitations as any other law. Accordingly, the legislation could be challenged under the *Canadian Charter of Rights and Freedoms* or any relevant human rights laws.[32]

4. Direct Votes are Divisive

Critics of direct votes also commonly argue that such votes and their attendant campaigns are inherently divisive because they emphasize and potentially exaggerate the different viewpoints on either side of a given issue. Proponents of this argument suggest that, by requiring people to choose sides on controversial questions, direct votes prevent and discourage compromise on these issues. In addition, because direct votes ultimately create "winners" and "losers", these votes alienate people of differing views. It is further suggested that the divisive effect of direct democracy measures is especially evident in countries which have an ethnically or linguistically diverse population and a federal goverment structure. In support of this position, reference is often made to the 1898 and 1942 Canadian referendums, where the referendum campaigns apparently emphasized the English-French division within the country and arguably contributed to the further alienation of these two communities.

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[30] Cronin, *supra* n. 5, at 85.

[31] *Ibid*.

[32] Of course, depending on the terms of the enabling legislation, national direct votes could be used to alter the terms of the Charter itself or of other human rights legislation. For a discussion of this possibility and the potential implications for minority rights, see Chapter V, Section III.

To some extent, the above criticism of direct voting is irrefutable: by their nature, direct votes and their attendant campaigns emphasize opposing viewpoints on legislative issues and require people to choose sides on these issues. In advancing this proposition, however, critics of direct voting often fail to acknowledge that there is an important distinction between calling attention to an existing division of opinion and creating such a division. Typically, a legislative issue is put to a direct vote because a divergence of opinion on this issue is already recognized: the question merits a direct vote precisely because a notable difference of opinion exists. Accordingly, far from creating a division of opinion, a direct vote merely draws attention to divisions which already exist.

Undoubtedly, in some cases even simply drawing attention to existing divisions within the country may initially appear to be harmful to national unity. In the long run, however, it is doubtful that this harm is avoided by simply allowing these divisions to go unrecognized and unresolved. In fact, some would argue that the unity of any democratic country requires the public identification and debate of differing opinions:[33]

> The concern that a referendum would be divisive and the conclusion that it should therefore be avoided is one of the silliest arguments anyone in a democracy could advance. Of course it is divisive. It divides us into two camps--those who favour and those who oppose a particular measure. It then enables everyone to see . . . exactly how many Canadians are for and how many against. Then the country can move forward from there.
>
> As in a dialectic process, it may only be possible at the stage following a referendum vote to approach some synthesis.

5. Direct Votes Do Not Lead to Clear Legislative Results

Another concern often expressed by those opposed to direct votes is that these votes cannot lead to clear legislative results. The basis of this argument is that referendums and plebiscites are incapable of recording the intensity of feeling behind the various votes cast nor the reasoning behind the votes. Accordingly, advocates of this view suggest that legislation should not be enacted on the basis of a simple majority vote because the majority position may involve little conviction for the measure while the minority view may reflect an intense concern for the matter in question. Further, the majority vote may be motivated by invalid considerations, such as a desire to express a general protest against the government proposing the measure in question.

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[33] Boyer, *The People's Mandate*, *supra* n. 5 at 183.

Once again, this argument is indisputable to the extent that it recognizes that the intensity of feeling and the motives behind a majority vote cannot be accurately measured through a conventional voting process. This problem, however, is indicative of a flaw with the "first past the post" voting process in general, regardless of whether this process is utilized to elect representatives or to decide a controversial issue. Moreover, the same problem arises when elected representatives vote on legislation. There is no way of knowing whether a given representative voted for a legislative proposal because of a firm belief in the proposition, because of party policy, because of constituent pressure, or for any number of other reasons.

6. Holding Direct Votes on Some Issues May Lead to Direct Votes Being Held on All Matters

Another argument often raised by opponents of direct voting can be characterized as a "floodgates" argument. Heard consistently in the United Kingdom when the EEC referendum was proposed, this argument suggests that, once a direct vote is held on one issue, direct votes will be demanded on every controversial legislative matter. Advocates of this view suggest that the resultant unbridled use of direct votes may lead to radical, reactionary legislation and may ultimately undermine of the authority of elected representatives.

To date, the experience of western democracies raises considerable doubt that the introduction of direct voting mechanisms has a floodgates effect. Even in jurisdictions where the people can and do initiate direct votes, the availability of these votes does not appear to have usurped or undermined the role of elected representatives in the lawmaking process. The people most frequently appear to become involved with respect to especially controversial or significant matters. Further, despite the direct involvement of the public in voting on a number of issues, to date there always seems to be enough issues left for the consideration of elected representatives. In any event, as already noted, even where direct votes are commonly used, these votes have not usually resulted in radical, reactionary, or revolutionary legislation.

Finally, it should be noted that the extent to which direct votes are used depends greatly upon the degree of control which the public has in instigating such votes. In California, for example, the initiative mechanism has enabled citizens to bring a number of measures to a popular vote. On the other hand, despite the widespread concern that the EEC vote would lead to additional direct votes on other matters, a national direct vote has not been held in the United Kingdom since 1975. This lack of further direct votes in the U.K. is certainly attributable to the fact that the decision to hold such votes remains with Parliament--the people have no legal means of initiating a direct vote on their own. Accordingly, the floodgates problem can obviously be avoided or controlled by limiting the public's ability to initiate direct votes.

IV. CONCLUSION:

BALANCING THE BENEFITS & THE COSTS ASSOCIATED WITH DIRECT VOTES

Based on the above discussion, several observations can be made regarding the benefits and costs typically associated with direct votes. First, despite some practical experience with direct votes in Canada and other western democracies, to a large extent the benefits and costs commonly linked to direct votes remain nebulous and elusive concepts which may or may not materialize whenever a direct vote is held. For example, while the benefits commonly linked to direct voting certainly seem theoretically desirable for any democratic nation, the extent to which these benefits are realized in practice depends upon an indeterminate number of factors, most important being the amount of public participation in the direct voting process and the degree to which the results of these votes are reflected in legislation. Similarly, although theoretical and practical grounds apparently exist for challenging the validity of many of the problems typically associated with direct voting, in reality there always remains some risk of one or more of these difficulties arising when a direct vote is held. Second, given the elusive nature of the benefits associated with direct votes, one can only say with certainty that national direct votes provide a country with the *opportunity* to be more democratic and to therefore reap the associated benefits. Third, while the problems commonly linked to direct votes must be recognized as potential hazards which may materialize depending upon the manner and extent to which national direct voting mechanisms are employed, none of the problems identified appears to be so dangerous or prevalent as to be absolutely prohibitive of the use of direct votes. Finally, as noted at the outset of this chapter, each of the arguments in favour of and against direct voting is founded in a subjective judgment about the value of democracy itself. Specifically, the argument favouring direct voting is clearly founded in a fundamental belief in the "power of the people." On the other hand, the problems raised in opposition to direct voting are indicative of a basic distrust of the judgment of the people and the principles of majority rule.

Unfortunately, because the benefits and costs associated with direct votes remain somewhat elusive and unpredictable, the question of whether Canada should employ national direct votes as a lawmaking tool cannot be answered objectively by simply weighing the pros and cons on either side of the argument. Instead, while acknowledging the potential benefits and dangers of direct voting, it appears that this question can only be answered subjectively, depending for its resolution upon the strength of one's democratic values:[34]

> While an evaluation of the strengths and weaknesses of the referendum can help increase knowledge about the device, it alone cannot be relied upon to reach a final position on the adoption of the referendum. It makes no sense, for instance, to count the number of benefits and costs and form an opinion based on the overall total. Similarly, no mathematical formula exists to calculate precisely the

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[34] Hahn & Kamieniecki, *supra* n. 5, at 23-24.

> appropriateness of the referendum by considering the importance of each strength and weakness. Such assessments are subjective and are likely to differ markedly among individuals. Rather, the arguments most often heard in favour of or in opposition to the referendum are actually rooted in normative considerations that lie at the heart of democratic theory. Fundamentally, political scientists must consider the extent to which public input is desirable in a democracy.

In the writer's opinion, effective public input on important legislative issues is desirable in a democracy and our current representative government system often falls short of achieving this goal. This view, coupled with the acknowledgement of the potential democratic benefits associated with direct votes and the lack of an obviously prohibitive problem with direct votes, leads this writer to the conclusion that direct votes should play a greater national legislative role in Canada in the future.

This conclusion is bolstered by the fact that we now have the technology required to make national direct voting a practical method of obtaining public input on legislative issues:[35]

> Certainly, the technology needed to give democratic processes a more direct connection sits on the shelf today. No sooner has the last pitch been thrown at the Skydome than the Play of the Game has been selected by a nation-wide

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[35] D. Mersich, "Wired-In Democracy" (August 1991) 23:8 *Canadian Datasystems* 18 at 18. It should be noted that, in recent years, Canadians have used the latest technology to cast telephone votes on innumerable matters, ranging from movie preferences to political party leaders. Despite some inevitable snags, generally these experiences certainly demonstrate that the technology exists to make direct voting a feasible alternative to representative government. (Obviously, a number of issues exist with respect to the type of technology best employed for national direct votes and how this technology should be managed, but a discussion of these matters is beyond the scope of this paper).

> phone-in to a 900 number.
>
> Given today's computer and communications, there are no insoluble technological problems preventing the creation of a virtually wired-in direct democracy. It merely requires implementation.

Accordingly, while logistical concerns of time and distance may have previously led Canadians to delegate their lawmaking powers to elected representatives, such delegation may no longer be necessary because we now have the technology to overcome these logistical problems and to make direct voting a practical method of obtaining public input on legislative issues. We have the ability to ensure that the necessary information on both sides of a plebiscite or referendum question is available to all Canadians and to ensure that Canadians can vote on contemporary issues with a minimum of effort. In the face of such technology, why would we rely on the relatively clumsy mechanism of representative democracy to decide our nation's most important issues?

Given the above conclusion, the extent to which national direct votes should be used must also be considered. For example, should direct votes only be held at the instigation of the government, or should the people have the ability to initiate these votes? Should the people vote only on government-sponsored legislation or should they be able to place their own legislative proposals on the ballot? Should the people vote only on certain issues or on any legislative matters? Should the votes be binding on the government? While the answer to these questions once again involves a subjective assessment of the value of democracy, a meaningful and practical resolution of these matters also requires a careful balancing of the potential benefits and costs associated with direct voting. While the greatest democratic benefits of direct votes are certainly achieved with the fewest restrictions on the involvement of the people, by the same token the fewer the limitations on the involvement of the people the greater the possibility of one of the problems associated with direct votes materializing.[36] Accordingly, the constructive use of direct votes necessarily involves a compromise between the potential democratic benefits of these votes and the potential problems associated with these votes.

Where the practical compromise point between the benefits and hazards of direct voting is best located depends on a number of variables including, perhaps most significantly, the degree of public interest in being involved in directly deciding certain legislative questions and the importance of certain issues to the operation of the nation. In accordance with the democratic purpose of direct voting, the best way to decide how national direct votes should be used would be to hold a referendum and let the people decide how much input they want to have. Short of this solution, however, as a starting point for advancing Canada's use of national direct votes, the following observations and recommendations are offered:

(i) As noted previously, direct votes can only truly contribute to the legitimization of legislation and the sovereignty of the people if the results of these votes are reflected in law. Accordingly, at minimum, whether direct votes are initiated by the government or by the people, the country's direct voting legislation should make all direct votes legally binding on the government.

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[36] For example, as noted earlier, the potential problem of direct voting being inconsistent with the notion of Parliamentary Sovereignty and the possibility of a "floodgates" approach to direct voting can be avoided if direct votes can only be held at the instigation of Parliament.

(ii) Certain legislative issues, such as constitutional matters in particular, are fundamental to our national sovereignty and to the operation of our political and legal systems. Accordingly, the public interest in preserving and pursuing basic democratic principles with respect to these matters appears to outweigh many of the risks associated with direct votes. Thus, direct votes should be mandatory at least with respect to matters of constitutional reform and national sovereignty. This suggestion is not intended to minimize the role of elected representatives in negotiating constitutional reforms, but rather is offered as a means of ensuring that the people of Canada also have a significant and effective role in determining the nation's constitutional future. This role would be best secured if the people were given the power to initiate constitutional reform as well as to vote on government sponsored proposals, however, the latter ability at minimum is necessary to significantly increase the democratic nature of our constitution.

(iii) If direct votes are to be held on ordinary legislative issues (i.e. non-constitutional matters), the overall democratic nature of our national lawmaking system will only be increased if direct voting legislation enables such votes to be initiated by the people. To enact national direct voting legislation which leaves the decision of holding direct votes to Parliament would do nothing more than legislate the status quo. As shown by Canada's direct voting history to date, even when no general enabling statute exists, Parliament always has the option of putting legislative questions to the public by passing topic-specific legislation.

Obviously, while offered only as minimum proposals for the reform of direct voting in Canada, the above recommendations do not go very far in advocating the use of national direct votes except in the critical area of constitutional matters. The decision to recommend direct voting on constitutional matters only is not indicative of any disapproval by the writer of direct voting on ordinary legislative questions. Instead, this minimum recommendation reflects the writer's view that, acknowledging the potential risks associated with direct voting, direct votes *must* be held on constitutional issues because these issues are by nature so fundamental to the governing of our country that they merit the direct input of the public.

In response to the recommendations made above, some readers might argue that the limited use of direct votes (such as in the case of constitutional matters only) does not accurately reflect the democratic principles relied on to justify direct votes. According to this argument, if the purpose of direct voting mechanisms is to achieve true "government by the people", this purpose can only be achieved by giving the people absolute power to initiate and vote on any and all legislative proposals. If direct votes are justified on the basis of democratic values, then it is a betrayal of these values to place arbitrary limits on public input.

The main problem with the above argument is that it suggests that, unless we can completely empower the people through a process of direct voting, we should not accept direct voting as a legislative tool at all. This approach focuses completely on the democratic values behind the concept of direct voting and fails to recognize that these values must always be balanced against practical concerns and potential problems associated with translating these values into practice. Generally, the effect of the democratic benefits of direct voting and the degree to which the potential problems associated with direct voting can be tolerated depends upon the issue under consideration. Thus, it is not unreasonable to begin expanding Canada's use of direct votes by identifying the issues which merit the greatest consideration by the people and which accordingly are most tolerable of the risks linked to direct voting. At this point, in Canada these issues certainly appear to include at least constitutional matters.

Finally, in light of the writer's conclusion that direct votes should play a national lawmaking role in Canada, it must be remembered that the ultimate goal of employing national direct votes should not be to create the perfect democratic legislative system. Instead, the goal of direct voting should be simply to increase the democratic character of our current legislative system by providing a new path for the people to effectively express their views on legislative matters. Accordingly,[37]

> Direct legislation should be judged, then, not as a means of creating a perfect government, but as a suitable method of communicating the will of the people.

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[37] Tallian, *supra* n. 12, at 17.

CHAPTER FIVE

LEGAL & CONSTITUTIONAL LIMITS ON DIRECT VOTING

As previously stated,[1] in the writer's view, direct votes should play a greater national legislative role in Canada in the future. While this conclusion may initially appear to be simple enough, in fact it raises a number of questions regarding the legal parameters which can and should govern the increased use of national direct votes. For example, what legal or constitutional authority currently exists or is required to support the increased use of national referendums or plebiscites? What legal limits or impediments, if any, are likely to arise regarding the future employment of direct votes and how can these potential problems be avoided? How can the use of national direct votes be made easier in the future? This Chapter will consider these questions and the future use of national direct votes in Canada in the context of three main issues:

I. What legal or constitutional obligations currently exist or may be imposed on the federal government to conduct national direct votes in the future?

II. What legal or constitutional issues may arise regarding the enabling provisions of legislation authorizing future national direct votes to take place?

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[1] See Chapter IV, Section IV.

III. What legal or constitutional issues may arise regarding the content of legislation or constitutional amendments enacted by a direct vote?

Hopefully, the following discussion of these three questions will serve as a map or blueprint for the future use of national direct votes in Canada by identifying the legal routes favouring such votes, warning of potential legal pitfalls or obstructions to the use of direct votes, and suggesting alternative paths for avoiding these pitfalls.

I. WHAT LEGAL OR CONSTITUTIONAL OBLIGATIONS CURRENTLY EXIST OR MAY BE IMPOSED ON THE FEDERAL GOVERNMENT TO CONDUCT NATIONAL DIRECT VOTES IN THE FUTURE?

In the previous Chapter, it was suggested that an appropriate method of deciding whether a national direct vote should be held in a particular instance is to evaluate the national importance of the subject-matter of the vote.[2] By this criteria, constitutional amendments would almost certainly merit a direct vote while ordinary legislative matters might not. Not surprisingly, this distinction between direct votes on constitutional amendments and direct votes on ordinary legislative matters also becomes important when considering the federal government's legal and constitutional obligations to conduct future direct votes. Although Canada has had national referendum experience with both constitutional amendment proposals (the 1992 referendum) and ordinary legislative matters (the 1898 and 1942 referendums), it appears that the federal government's obligations to hold future direct votes may differ significantly depending upon the subject matter of the vote.

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[2] *Ibid.*

A. Constitutional Amendments

Since the defeat of the Charlottetown Accord, many observers have concluded that the 1992 constitutional referendum established an irrevocable precedent which requires all future amendments to the Canadian constitution to be approved by a national direct vote.[3] In the words of one writer:[4]

> One thing is clear--there will be no going back to politics as usual, certainly not in constitutional matters. The Canadian people, having drunk the heady wine of referendum democracy and experienced the elation of saying 'no' to its betters, will not easily accept a passive role again. Any future constitutional changes . . . will have to entail a thoroughly democratic process . . .

In essence, this conclusion suggests that the formal amending formulas set out in the

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[3] See for example: P. H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (2nd ed., 1993) at 234; J.P.Boyer, *Hands On Democracy* (1993) at 95; H. McConnell, "Saskatchewan Speaks on the Charlottetown Accord: Why did the Province Most Likely to Vote 'Yes' Vote 'No'?" (Feb-Mar 1993) 18:2 *NeWest Review* 19 at 20; P. Marquis, *Referendums in Canada: The Effect of Populist Decision-Making on Representative Democracy* (Library of Parliament, August 1993); and R. Gibbins & D. Thomas, "Ten Lessons from the Referendum" (Winter 1992-1993) 15:4 *Canadian Parliamentary Review* 3 at 3.

[4] D. Cameron, "After Charlottetown" from "October 26, 1992: A Symposium on the Outcome of the National Vote", (December 1992) 71:815 *Canadian Forum* 12 at 16.

Constitution Act, 1982[5] are incomplete and that a national direct vote is now an essential element of this country's constitutional amendment process. If correct, this conclusion obviously has seriously implications for future changes to Canada's constitution and, accordingly, a closer examination of the constitutional implications of the 1992 referendum is warranted. Specifically, this section will consider the extent to which the Canadian government is currently obligated to hold direct votes on future constitutional amendment proposals and how this obligation is now or may be established in the future by constitutional convention, by statute, and by the constitution itself.[6]

1. Obligations Under Constitutional Convention

In order to answer this question, the following four issues must be considered:

(a) what is a constitutional convention?

(b) what is the test for determining whether a constitutional convention has been established?

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[5] As enacted by *Canada Act 1982* (U.K.), c. 11.

[6] As any introductory text on Canadian government will explain, the Canadian constitution consists of two basic sets of rules respecting the operations of government: first, there are are the written rules which are found in the constitutional documents themselves and in other statutes, orders in council, or court decisions (common laws) and, second, there are the unwritten rules or "conventions" established through the practice of government. (These sources of Canadian constitutional law were recognized by the Supreme Court of Canada in the *Reference Re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)*, *infra* n. 8 at pp. 81-82). Accordingly, if any legal obligation currently exists requiring the Canadian Government to hold a national referendum on proposed constitutional amendments, this obligation will be found in the written constitution, in relevant statutes or common law, or in unwritten conventions.

(c) has a constitutional convention been established which requires the federal government to hold a national referendum on proposed constitutional amendments?

(d) if a constitutional convention exists which requires the federal government to hold a national referendum on proposed constitutional amendments, what are the terms of this convention?

(a) What is a Constitutional Convention?

Ironically, although conventions are universally recognized as forming part of Canada's constitution and certain conventions are commonly relied upon in the operations of the Canadian government, a satisfactory generic definition of a "constitutional convention" has traditionally proven to be somewhat elusive. Over the years, a number of political and legal analysts have offered varying explanations of this concept.[7] Finally, a legally binding definition of a constitutional convention was set out at length by the Supreme Court of Canada in *Reference Re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)*[8]:

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[7] See for example: A. Heard, *Canadian Constitutional Conventions: The Marriage of Law & Politics* (1991); P. Hogg, *Constitutional Law of Canada* (3rd ed., 1992); I. Jennings, *The Law and the Constitution* (5th ed., 1959); E.A. Forsey, "The Courts and the Conventions of the Constitution" (1984) 33 *U.N.B.L.J.* 11; and C.R. Munro, "Laws and Conventions Distinguished" (1975) *Law Quarterly Review* 218.

[8] (1981) 125 D.L.R. (3d) 1 at 86. (Note that some of this definition was adopted by the S.C.C. from the decision of the Manitoba Court of Appeal in the same case). This case will hereafter be referred to as the *Constitutional Reference Case*.

> What is a constitutional convention? There is a fairly lengthy literature on the subject. Although there may be shades of difference among the constitutional lawyers, political scientists and Judges who have contributed to that literature, the essential features of a convention may be set forth with some degree of confidence. Thus there is general agreement that a convention occupies a position somewhere in between a usage or custom on the one hand and a constitutional law on the other. There is general agreement that if one sought to fix that position with greater precision he would place convention nearer to law than to usage or custom. There is also general agreement that 'a convention is a rule which is regarded as obligatory by the officials to whom it applies.' Hogg, *Constitutional Law of Canada* (1977), p. 9. there is, if not general agreement, at least weighty authority, that the sanction for breach of a convention will be political rather than legal.
>
> It should be borne in mind, however, that, while they are not laws, some conventions may be more important than some laws. Their importance depends on that of the value or principle which they are meant to safeguard. Also they form an integral part of the Constitution and of the constitutional system. They come within the meaning of the word 'Constitution' in the preamble of the *British North America Act, 1867*:
>
> > Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united . . . with a Constitution similar in principle to that of the United Kingdom:
>
> That is why it is perfectly appropriate to say that to violate a convention is to do something which is unconstitutional although it entails no direct legal consequence. But the words 'constitutional' and 'unconstitutional' may also be used in a strict legal sense, for instance with respect to a statute which is found ultra vires or unconstitutional. The foregoing may perhaps be summarized in an equation: constitutional conventions plus constitutional law equal the total Constitution of the country.

In short, then, based on the Supreme Court's comments, a constitutional convention may be described as a rule of practice which is designed to safeguard a given societal principle or value, and which is generally agreed upon as being binding on government actors, and the breach of which would carry political, rather than legal, sanctions.[9] The purpose and benefit of constitutional conventions is that they permit flexibility in the operations of government, allowing constitutional practices to adapt to changing political realities and prevailing values.[10]

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[9] Because conventions are not laws and have no legal sanctions attached to them, they can be recognized but not enforced by the courts. This point was expressly made in the majority decision of the Supreme Court in the *Constitutional Reference Case* at p. 84-85:

> The conventional rules of the Constitution present one striking peculiarity. In contradistinction to the laws of the Constitution, they are not enforced by the Courts. One reason for this situation is that, unlike common law rules, conventions are not judge-made rules. They are not based on judicial precedents but on precedents established by the institutions of government themselves. Nor are they in the nature of statutory commands which it is the function and duty of the Courts to obey and enforce. Furthermore, to enforce them would mean to administer some formal sanction when they are breached. But the legal system from which they are distinct does not contemplate formal sanctions for their breach.
>
> Perhaps the main reason why conventional rules cannot be enforced by the Courts is that they are generally in conflict with the legal rules which they postulate and the Courts are bound to enforce the legal rules. The conflict is not of a type which would entail the commission of any illegality. It results from the fact that legal rules create wide powers, discretions and rights which conventions prescribe should be exercised only in a certain limited manner, if at all.

The non-legal, non-judicially enforceable nature of conventions was also recognized by the Supreme Court of Canada in the subsequent decision in the *Reference re Objection to a Resolution to Amend the Constitution* [1982] 2 S.C.R. 793 at 802 (hereinafter referred to as the *Quebec Reference Case*).

Also may be worth noting that some authors have suggested that conventions may not all be of equal importance, and that they may in fact vary in importance: See for example, Heard, *supra* n. 7, at 141.

[10] See Heard, *supra* n. 7, at 5; Hogg, *supra* n. 7, at 25; Jennings, *supra* n. 7 at 101; and Forsey, *supra* n. 7, at 13.

(b) What is the Test for Determining Whether a Constitutional Convention Has Been Established?

Unfortunately, the above definition of a constitutional convention does not readily lead to a conclusive test for determining whether a convention exists in a given case.[11] On the contrary, this definition leaves open a number of questions regarding the type of principles or values upon which a convention may be based, the nature and extent of the agreement required to establish a convention, and the number and type of precedents required to create a convention. Once again, while a number of writers have provided varying opinions on these matters,[12] the prevailing legal test for determining whether a constitutional convention exists in Canada was set out in the majority decision of the Supreme Court of Canada in the *Constitutional Reference Case*[13].

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[11] It should be noted that the fact that constitutional conventions differ from legal rules and are not legally enforceable does not mean that an objective test for determining the existence of conventions cannot be established. In the words of the Supreme Court of Canada in *Reference re Objection to a Resolution to Amend the Constitution*, *supra* n. 9 at 802:

> . . . conventional rules, although quite distinct from legal ones, are nevertheless to be distinguished from rules of morality, rules of expediencey and subjective rules. Like legal rules, they are positive rules the existence of which has to be ascertained by reference to objective standards. In being asked to answer the question whether the convention did or did not exist, we are called upon to say whether or not the objective requirements for establishing a convention had been met.

[12] *Supra* n. 7.

[13] *Supra* n. 8.

In the *Constitutional Reference Case*, the majority of the Court held that the requirements for establishing a constitutional convention are similar to those for establishing common laws because, like common laws, conventions are created through precedents and through the recognition of their normative value. Accordingly, the majority of the Court adopted the following three point test for determining whether a convention exists:[14]

> We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.

It should be noted, however, that the three elements of this test are not of equal importance in determining whether a convention exists and that satisfying each of these elements may accordingly require a different level of analysis and proof.

Obviously, the first element of the above test simply determines whether a given practice has been followed in the past. Generally, this aspect of the test is the least important of the three criteria and is easily dismissed by a brief review of past practices. On the other hand, the second and third elements of this test focus on the normative value of past precedents and are, therefore, generally recognized as being the more salient aspects of the test. The second element in particular has been recognized as being crucial in deciding whether a convention exists:[15]

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[14] *Ibid.*, at 190. See also: Jennings, *supra* n. 7 at 136. Also note: a similar test, having four elements, is proposed by A. Heard, *supra* n. 7 at 142.

> . . . the most important requirement for establishing a convention . . . is, acceptance or recognition by the actors in the precedents . . .
>
> Recognition by the actors in the precedents is not only an essential element of conventions. In our opinion, it is the most important element since it is the normative one, the formal one which enables us unmistakably to distinguish a constitutional rule from a rule of convenience or from political expediency.

Respectively, the second and third elements of the test are designed to determine whether the precedents in question are considered binding by the political figures involved and whether the precedents reflect a prevailing social value. Accordingly, satisfying these two elements of the test requires a more detailed analysis of past practices, government documents, political statements and academic writings. In the words of E.A. Forsey:[16]

> Knowledge of constitutional conventions . . involves examining the precedents and a variety of documents, the pronouncements of eminent statesmen and important politicians, and the writings of constitutional authorities. It involves also deciding which of these were soundly based and whether changes in the political situation or culture have made them irrelevant.

In order to more fully appreciate how the above test is used to ascertain the existence of a constitutional convention, it is useful to review the manner in which this test has been applied in past cases. To date, there have only been two Canadian cases which have applied this test to ascertain the existence of a constitutional convention, both of which were ultimately decided by the Supreme Court of Canada. First, in the *Constitutional Reference Case*[17], the Supreme Court was asked to determine whether a constitutional convention exists which requires the federal government to obtain the agreement of the provinces in order to amend the Canadian constitution. Second, in the subsequent but related *Quebec Reference Case*[18], the Supreme Court was asked to determine whether a constitutional convention exists which requires the federal government to obtain the consent of the province of Quebec in order to amend the constitution.

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[15] *Constitutional Reference Case*, *ibid.*, at 814 and 816.

[16] Forsey, *supra* n. 7, at 37. Note that A. Heard, *supra* n. 7, at 143-144 suggests that consensus of support for a convention should not only be among the political actors themselves but also among academics, judges and the public, although the consensus need not be unanimous.

In the *Constitutional Reference Case*, the majority of the Court strictly applied the three-prong test set out above and found that a constitutional convention does exist which requires the federal government to obtain a "substantial degree" of provincial consent in order to amend the constitution in a manner which would affect provincial powers. With respect to the first element of the test, the court reviewed all the previous amendments to the constitution as well as some previous federal-provincial negotiations on proposed constitutional amending formulas. Based on this review, the court concluded that "no amendment changing provincial legislative powers has been made since Confederation when agreement of a Province whose legislative powers would have been changed was withheld."[19]

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[17] *Supra* n. 8.

[18] *Supra* n. 9.

Recognizing that the precedents were indicative but not determinative of the existence of a convention, the court then turned to the second element of the test. In considering whether the political actors involved treated the rule of provincial consent as binding, the court examined the contents of a federal government "White Paper" (which purported to set out the fundamental principles governing constitutional amendment) and reviewed a number of declarations made by various government Ministers over the years as they struggled with the prospects for constitutional amendment. The court concluded that all of this evidence revealed a "clear recognition by all the Governments concerned of the principle that a substantial degree of provincial consent is required"[20] for constitutional amendments affecting provincial powers. It should be noted, however, that the court was quite selective with respect to the type of information relied upon to make this finding. For example, while the court was referred to a number of statements which suggested that provincial consent was not required for constitutional amendment, the court disregarded these statements on the ground that they were made by politicians "who were not ministers in office and could not be considered as 'actors in the precedents'".[21] Accordingly, the Supreme Court's decision clearly indicates that, when applying the second aspect of the constitutional convention test, the only relevant opinions are those of the actors who are actually involved in carrying out the precedents.[22]

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[19] *Supra* n. 8 at 94.

[20] *Ibid* at 103.

[21] *Ibid*.

Turning to the final aspect of the three-prong test, the Supreme Court concluded that the need to obtain provincial consent for constitutional amendments affecting provincial powers was based upon the principle of federalism. Relying heavily upon comments made by government members during federal-provincial negotiations and conferences, the court found that provincial consent for constitutional amendments was an "essential requirement" of the federal principle.[23] In the words of the Court:[24]

> The purpose of this conventional rule is to protect the federal character of the Canadian Constitution and prevent the anomaly that the House of Commons and Senate could obtain by simple resolutions what they could not validly accomplish by statute.

Having thus satisfied all three elements of its three-prong test, the majority of the court concluded that the convention in question does exists.

The *Constitutional Reference Case* also included a lengthy dissenting judgment in which three members of the Supreme Court concluded that a constitutional convention requiring provincial consent for constitutional amendments did not exist. Although the dissenting judgment did not expressly adopt the three-prong test set out in the majority decision, there is no substantial disagreement between the majority opinion and the dissenting opinion as to the requirements for establishing a constitutional convention.[25] Still, the dissenting judgment does apply the criteria for establishing a constitutional convention in a different manner than that employed by the majority of the court.

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[22] This seems to be a reasonable position since it is really only the actors who are involved in carrying out a particular action who can say whether they feel compelled by popular expectation to proceed with that action or to carry it out in a certain manner.

[23] *Supra* n.8 at 104.

[24] *Ibid*. at 106.

Unlike the majority decision, the dissenting judgment in the *Constitutional Reference Case* focuses on a comparison between the proposed convention in the case at bar and other traditional conventions such as the general rule that the Governor General will act only according to the advice of the Prime Minister and the rule that after a general election the Governor General will call upon the leader of the party with the greatest number of seats to form a government. Accordingly, after reviewing the Canadian history of constitutional amendments and comments made by various statesmen, the minority of the Court concluded that a "clear definition and acceptance" of provincial participation in the amendment of the Canadian Constitution has not been established to the same degree enjoyed by the traditionally accepted constitutional conventions noted above. In fact, the dissenting judges found that, rather than having become "so clear and so broadly accepted as to constitute a constitutional convention", the extent of provincial participation in the constitutional amendment process has been "a subject of lasting controversy in Canadian political life for generations."[26]

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[25] See the *Quebec Reference Case*, *supra* n. 9 at 802 where the Supreme Court makes this point in reference to the *Constitutional Reference Case*.

The Supreme Court of Canada also applied the same three part test in the *Quebec Reference Case*. In this case, the Court considered whether Quebec has a conventional veto power with respect to constitutional amendments. In answering this question, the Court focused primarily on the second element of the three-part test: that is, whether there was sufficient acceptance or recognition of the proposed convention by the actors involved. Ultimately, the court found that no such acceptance or recognition was established by the evidence:[27]

> We have been referred to an abundance of material, speeches made in the course of parliamentary debates, reports of royal commissions, opinions of historians, political scientists, constitutional experts which endorse in one way or another the principle of duality within the meaning assigned to it by the appellant, and there can be no doubt that many Canadian statesmen, politicans and experts favoured this principle.
>
> But neither in his factum nor in oral argument did counsel for the appellant quote a single statement made by any representative of the federal authorities recognizing either explicitly or by necessary implication that Quebec had a conventional power of veto over certain types of constitutional amendments.

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[26] *Supra* n. 8 at 114-115. Note that the difference in result between the majority and the minority decisions arises because the minority focuses on amendments which did not specifically affect legislative powers and were therefore undertaken without provincial consent. For the purposes of the present discussion, however, the critical point is not in the result of either the majority or the minority decisions but is the manner in which they apply the criteria for determining whether a convention exists.

[27] *Supra* n. 9 at 814.

Given this finding, it appears that the Supreme Court's decision in this case adds an important caveat to the application of the second aspect of the three part test for constitutional conventions -- namely, that the actors involved in the precedents must have specifically articulated their recognition or acceptance of a convention in order for that convention to be recognized by the courts. As stated by the Supreme Court:[28]

> . . . in our view, a convention could not have remained wholly inarticulate, except perhaps at the inchoate stage when it has not yet been accepted as a binding rule. We know of no example of a convention being born while remaining completely unspoken, and none was cited to us. It seems to us that the contention of appellant's counsel to the effect that conventions need not be explicitly accepted is impossible to distinguish in practice from a denial of the requirement of acceptance by the actors in the precedents. It is precisely through reported statements by numerous actors that a convention could be identified in the *First Reference*. Such statements provide the only true test of recognition and, once again, unmistakably distinguish a constitutional rule from a rule of convenience or from political expediency.

(c) Has a Constitutional Convention Been Established Which Requires the Federal Government to Hold a National Referendum on Proposed Constitutional Amendments?

As indicated by the above discussion, as a result of the Supreme Court's decisions in the *Constitutional Reference Case* and the *Quebec Reference Case*, the test for determining whether a constitutional convention exists now appears to be well-established in Canadian law. Accordingly, this three-prong test must be relied upon to determine whether a constitutional convention now exists which requires the federal government to hold a national referendum on future constitutional amendments proposals. As one might expect, while the first and third elements of this test are relatively easy to satisfy, the second criteria is significantly more difficult to meet.

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[28] *Ibid*. at 817.

With respect to the first requirement of the constitutional convention test, although the 1992 referendum on the Charlottetown Accord stands as the only instance in which a national direct vote has been held in Canada on a proposed constitutional amendment, it nevertheless establishes a precedent for direct votes to be held on constitutional amendments.[29] With respect to the third element of the constitutional convention test, it is evident that national direct votes reflect the principles of democracy and popular sovereignty which are fundamental elements of Canada's political system. These principles certainly were reflected, at least in part, in the federal government's decision to hold the 1992 referendum after it became apparent that Canadians wanted more input into the process of constitutional reform. Arguably, these principles are especially important when dealing with constitutional matters since, by definition, the constitution of any democratic country should reflect the will of the people.[30]

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[29] In this context, the term "precedent" is used only to refer to a previous experience. In this sense, the term does not associate any particular value with this experience. Although this restricted use of the term "precedent" does not accord with the way this word is usually used in a legal context, this approach seems to be consistent with the Supreme Court's use of this term in the context of the three part test established in the *Constitutional Reference Case*.

Finally, with respect to the second element of the Supreme Court's three-part test, one must determine whether the actors involved in the 1992 precedent considered themselves bound to hold a referendum on proposed constitutional amendments. Further, although the test set out by the Supreme Court appears to be primarily concerned with the obligations recognized by the actors *in* the precedents *at the time* these precedents were established, given that the 1992 referendum is the sole example of a national direct vote on constitutional amendments, consideration should arguably also be given to whether the relevant actors *now* recognize an obligation to hold a national direct vote on future amendment proposals. Before these matters can be properly resolved, however, it is necessary to determine *who* the relevant actors in the precedent are.

Prior to 1992, the only people to play a decisive role in enacting constitutional amendments were elected representatives and government ministers. In the 1992 referendum, however, Members of Parliament and members of the public at large both played a determinative role in considering whether the proposed constitutional amendment package should be adopted. Are the relevant actors, then, the government ministers who referred the Charlottetown Accord to the public or the members of the public who were invited to participate in the referendum?

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[30] The issue, of course, is whether the "will of the people" regarding constitutional matters is best expressed through a direct national vote or through the vote of elected representatives.

Although the 1992 referendum constitutes the only alleged constitutional convention directly involving the Canadian public, it is valuable to note that, in its past deliberations over the existence of given constitutional conventions, the Supreme Court of Canada has concerned itself only with the obligations recognized by the political figures directly involved in carrying out these obligations. This approach seems to make sense because, in our representative government system, it has always been the government ministers who determine whether they are bound to follow a particular course of action. The 1992 referendum was no different in this regard because it was still the government ministers who determined whether they should (or were obligated by convention to) put the Charlottetown Accord to a direct vote. The Canadian people were certainly relevant actors in determining whether the proposed amendments should pass, but they were not relevant actors in determining whether a convention existed which required a direct vote to be held on the Accord.

What then, were the views of the "relevant actors" in the 1992 referendum with respect to their obligations to refer the constitutional amendment proposals to the public? To some extent, the very fact that politicians debated over whether a constitutional referendum should be held on the amendment package indicates that the 'relevant actors' did not believe that they were bound by convention to hold such a vote. Further, the fact that the enabling legislation itself is permissive and empowers the government to refer constitutional amendment proposals to the people only if cabinet "considers that it is in the public interest to do so"[31] indicates that the government did not consider itself constitutionally bound to submit all constitutional amendment proposals to the people. Accordingly, it appears that, at the time of the 1992 referendum, the relevant actors did not recognize a constitutional convention requiring the referendum to be held.

The more difficult question, however, is whether, following the 1992 referendum, the relevant actors in this precedent considered themselves constitutionally bound to hold direct votes on future constitutional amendment proposals.[32] Unfortunately, since the 1992 referendum, the government has not produced any definitive policies regarding the necessity of future constitutional referendums. Further, while some of the 'relevant actors' may occasionally have offered post-referendum comments recognizing an obligation for the government to hold direct votes on future constitutional amendment proposals, overall the relevant government actors do not appear to have exhibited a 'clear definition and acceptance' of an obligation to conduct national referendums on constitutional matters in the future. Certainly, applying the comparative approach taken by the dissenting judges in the *Constitutional Reference Case*, it does not appear that the obligation to hold a referendum on constitutional amendment proposals has been recognized and accepted by the relevant actors to the same degree as other traditional conventions such as those regarding the role of the Governor-General and the operations of Parliament.

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[31] *Referendum Act*, R.S.C. 1992, c. 30, s. 3.

[32] As noted above, while the future intentions of the relevant actors were not considered by the Supreme Court in its two previous decisions regarding constitutional conventions, since only one precedent for conducting a direct vote on constitutional amendments exists, it is likely that a court would consider the post-referendum views of the relevant actors in this precedent in order to determine whether a constitutional convention now exists requiring direct votes to be held on future constitutional amendment proposals.

In short, then, it does not appear that the evidence available to date demonstrates the "clear" and "broadly accepted" obligation by government actors which is required to establish a convention requiring national direct votes to be held on constitutional amendment proposals. Accordingly, it must be concluded that, based on the test set out by the Supreme Court of Canada, a constitutional convention does not currently exist requiring such direct votes to be held. At best, it may be said that a constitutional convention requiring referendums to be held on furture constitutional amendment proposals is presently at an "inchoate stage when it has not yet been accepted as a binding rule."[33]

Although a constitutional convention requiring national direct votes to be held on constitutional amendments may not yet exist in a form which would be recognized by Canadian courts, the absence of such a formal constitutional convention does not mean that direct votes will not be held on future constitutional amendment proposals. On the contrary, in light of the country's experience in the 1992 referendum, it is probable that future constitutional amendments *will* be referred directly to the people. Rather than resulting from the government's recognition of a constitutional convention requiring a referendum to be held, however, the referral of future constitutional amendment proposals to a direct vote is likely to occur as a result of the government's recognition that, following the 1992 referendum, the public desires and expects to have a direct vote on matters of constitutional reform. Accordingly, in the end result, political pressures may demand the same response from the government as would a formal constitutional convention.[34] Further, the conduct of even one more national direct vote on a constitutional amendment proposal may provide the evidence required to meet the technical requirements for establishing a constitutional convention which would be recognized by the courts.

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[33] *Supra* n. 9 at 817.

(d) If a Constitutional Convention Exists Which Requires the Federal Government to Hold a National Referendum on Future Constitutional Amendment Proposals, What are the Terms of this Convention?

Notwithstanding the above conclusion and assuming that the federal government *is* now bound by constitutional convention to conduct national direct votes on future constitutional amendment proposals, several questions arise as to the terms of this constitutional convention. For example, is the federal government expected to conduct a national referendum on every constitutional amendment proposal regardless of the issue involved or the number of provinces affected by the proposal? Is the federal government bound to adhere to the results of the referendum? What percentage of the vote is required to pass an amendment proposal? Must the amendment proposal be approved in every province or region before it can be adopted by the federal government? Unfortunately, the single precedent of the Charlottetown Accord referendum provides little guidance in answering these questions.

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[34] The fact that there may not be a practical difference between the government's response if there is a convention and the government's political response may suggest that a more lenient test should be established by the courts in determining when a convention can properly be said to exist. An examination of this suggestion, however, if far beyond the scope of the present discussion.

As previously noted,[35] the Charlottetown Accord proposed omnibus changes to the Canadian constitution, addressing topics from Aboriginal self-government to Quebec's "distinct society" to Senate Reform. Thus, the Accord dealt with matters which, pursuant to the amending formulas set out in the *Constitution Act, 1982*, required the approval of all the provincial legislatures as well as with matters which required the approval of only some of the provincial legislatures.[36] Accordingly, when the decision was made to put the whole Charlottetown Accord to a direct vote, it was obvious that the vote had to be nation-wide and that, in order to succeed, the Accord would have to be adopted by the people in each province. In the end, the rejection of the Accord was so resounding in so many provinces that the federal government did not have the opportunity to consider further how much of an affirmative vote would have been required to constitute an approval of the Accord.

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[35] See Chapter III, Section I.C.

[36] The *Constitution Act, 1982, supra n. 5,* sets out a number of amending formulas which vary the degree of provincial approval required for an amendment to pass, depending on the subject matter of the amendment. Briefly, the various amending formulas are as follows:

(1) Section 38: Generally, constitutional amendments (especially those relating to the principle of proportional representation of the provinces in the House of Commons, the powers of the Senate, the method of selecting Senators, the number of Senate members per province, the residence qualifications of Senators, the Supreme Court of Canada [other than its composition], the extension of existing provinces into the territories and the establishment of new provinces) require the approval of Parliament and the legislatures of two-thirds of the provinces having at least fifty percent of the population of all the provinces.

Given the issues addressed in the Charlottetown Accord, then, the 1992 referendum arguably sets a precedent only for national direct votes to be held on constitutional amendments requiring unanimous provincial consent pursuant to the amending formulas set out in the *Constitution Act, 1982*. But what about amendment proposals which do not require the unanimous approval of the provinces? In 1993, after the failure of the

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Amendments derogating from the legislative powers or proprietary rights of a province, require the approval of a majority of the members in Parliament and a majority of the members of the provincial legislatures.

(2) Section 41: Amendments relating to the heads of state, the right of provinces to have no fewer members in the House of Commons than in the Senate, the use of the English or French language, the composition of the Supreme Court of Canada or to this amending formula require the approval of Parliament and of the legislatures of each province.

(3) Section 43: Amendments applying to one or more but not all provinces and relating to the alteration of provincial boundaries or to the use of the English or French language within that province require the approval of Parliament and only the legislatures of the affected province(s).

(4) Section 44: Other than as set out above, Amendments relating to the executive government of Canada or the Senate or the House of Commons require only the approval of Parliament.

Charlottetown Accord, the Canadian constitution was amended to make the province of New Brunswick officially bilingual--an amendment which had originally been included within the Charlottetown Accord. No national referendum on this amendment was held and the amendment was enacted by the approval of Parliament and the legislature of New Brunswick alone, pursuant to section 43 of the *Constitution Act, 1982*[37]. Accordingly, it appears that, in spite of the 1992 national referendum on constitutional reform, constitutional amendments affecting only some provinces and dealing with the matters set out in section 43 of the *Constitution Act, 1982* can still be made without a national direct vote.

Given the Canadian experience with the referendum on the Charlottetown Accord and with the 1993 constitutional amendment discussed above, the question of whether direct votes are expected to be held on future amendment proposals which do not require the approval of all provinces but which do not fall within the perview of the Section 43 of the *Constitution Act* remains open. At this point, however, it appears reasonable to assume that public pressure for national referendums on future constitutional amendment proposals will be directly proportional to the perceived national importance of these amendment proposals, where national importance is at least partially dependent upon the number of provinces affected by the proposed amendments. Further, in light of the example set by the 1992 referendum, where direct votes are held on future constitutional amendment proposals, the public will likely expect the government to abide by the result of these votes.[38] Finally, as in the case of the Charlottetown Accord, the degree of public approval required to ratify future constitutional amendment proposals will likely be a matter for the government to determine at the time of the direct vote, based primarily upon the issue in question. For example, in order to be politically palatable, an amendment affecting the status of Quebec would probably have to be approved by a majority of the voters in each of the provinces while an amendment relating to economic matters may only have to be approved by a majority of the voters in two thirds of the provinces or in each region of the country.

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[37] See n. 36.

2. Statutory Obligations

As previously noted,[39] while the first two national direct votes in Canada took place pursuant to short-term statutes which authorized the federal government to ask the voters specific questions only, the referendum on the Charlottetown Accord was held under the authority of a more general enabling statute: *The Referendum Act*.[40] Although this statute deals extensively with practical procedures to be followed when conducting a national direct vote, the heart of the *Referendum Act* is its central enabling provision which authorizes the federal cabinet to call a national direct vote on any matter relating to the constitution of Canada:[41]

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[38] Of course, as illustrated by King's decision not to instigate conscription immediately following the plebiscite of 1942, what steps are required for the government to be seen as following or abiding by the vote the people remains itself a potentially controversial issue.

[39] See Chapter III, Sections I.A. and I.B.

[40] *Supra* n. 31.

> Where the Governor in Council considers that it is in the public interest to obtain by means of a referendum the opinion of electors on any question relating to the Constitution of Canada, the Governor in Council may, by proclamation, direct that the opinion of electors be obtained by putting the question to the electors of Canada or of one or more provinces specified in the proclamation at a referendum called for that purpose.

While this statute, along with the above enabling provision, currently remains in force, it should be noted that the Act contains a mandatory review provision, requiring the entire statute to be reviewed by a Parliamentary committee within three years of its enactment:[42]

> (1) On the expiration of three years after the coming into force of this Act, this Act shall be referred to such committee of the Senate, of the House of Commons or of both Houses of Parliament as may be designated or established for the purpose of reviewing this Act.
>
> (2) The committee to which this Act is referred shall review the Act and submit a report thereon to the House or Houses of Parliament of which it is a committee, including a statement of any changes the committee recommends.

This provision was ultimately included in the Act in lieu of a mandatory sunset clause which had originally been proposed.[43]

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[41] *Ibid.*, s. 3(1).

[42] *Ibid.*, s. 40.

Generally, it must be conceded that the *Referendum Act* marks a significant step forward with respect to the availability of national direct votes as a tool for addressing Canadian constitutional issues. Now, for the first time, Canada has a general enabling statute in place permitting any constitutional question to be put directly to the people. From a practical perspective, the passage of the *Referendum Act* means that specific enabling legislation no longer needs to be enacted every time the government wants to obtain the opinion of the voters on a constitutional matter. Further, from a theoretical or symbolic perspective, the passage of the *Referendum Act* is indicative of Parliament's growing recognition and acceptance of the idea that the Canadian people should be more directly involved in the process of constitutional reform.

Notwithstanding the *Referendum Act*'s advancements toward direct democracy, however, the Act is significantly limited in that it imposes no legal obligation on the federal government to hold a national vote on constitutional matters. From a strictly legal perspective, the Act empowers the government to conduct a national direct vote on constitutional issues but it does not require the government to do so. On the contrary, the Act leaves it entirely to the federal cabinet to decide when holding a direct vote would be in the "public interest." Unless the government decides to hold a direct vote on a given constitutional matter, the people cannot legally force such a vote. Further, the Act authorizes the federal government to decide if a direct vote should be held on a national level or merely within one or more provinces. Finally, although the Act refers to direct votes as "referendums" rather than "plebiscites", the Act does not make the votes enforceable or binding on the government. Accordingly, rather than making direct votes a tool for the Canadian people to control constitutional reform, the *Referendum Act* only makes direct votes a government tool for assessing public opinion. In this sense, the *Referendum Act* remains a paper tiger, enabling the people to do little except roar, and, even then, only when asked to do so by the government of the day.

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[43] Originally, the government had intended to include a provision in this Act indicating that the Act would expire within 3 years of its proclamation. This provision was ultimately replaced with the mandatory review provision now included as s. 40 of the statute. For more information on this matter, see J.P. Boyer, *Direct Democracy in Canada: The History and Future of Referendums* (1992) at 52.

In considering the legal obligations imposed by the *Referendum Act*, it is useful to compare this statute's provisions with those set out in provincial legislation dealing with amendments to the federal constitution. As noted earlier,[44] both British Columbia and Alberta currently have legislation in place requiring provincial direct votes to be held on any constitutional amendment proposals before these proposals are voted on by the provincial legislature. Specifically, the relevant legislative provisions are as follows:

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[44] See Chapter III, Section III.A.

ALBERTA:

Constitutional Referendum Act[45]

1. The Lieutenant Governor in Council may order that a referendum be held on any question relating to the Constitution of Canada or relating to or arising out of a possible change to the Constitution of Canada.

2(1). The Lieutenant Governor in Council shall order the holding of a referendum before a resolution authorizing an amendment to the Constitution of Canada is voted upon the Legislative Assembly.

4(1). If a majority of the ballots validly cast at a referendum vote the same way on a question stated, the result is binding, within the meaning of subsection (2), on the government that initiated the referendum.

4(2). If the results of a referendum are binding the government that initiated the referendum shall, as soon as practicable, take any steps within the competence of the Government of Alberta that it considers necessary or advisable to implement the results of the referendum.

BRITISH COLUMBIA

Referendum Act[46]

1(1). If the Lieutenant Governor in Council considers that an expression of public opinion is desirable on any matter of public interest or concern, the Lieutenant Governor in Council may, by regulation, order that a referendum be conducted in the manner provided for in this Act.

3. If more than 50% of the validly cast ballots vote the same way on a question stated, that result is binding on the government that initiated the referendum.

4. If the reuslts of a referendum are binding, the government shall, as soon as practicable, take steps, within the competence of the Province, that it considers necessary or advisable to implement the reuslts of the referendum including any and all of the following:

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[45] S.A., 1992, c. C-22.25.

[46] S.B.C., 1992, c. 68.

> (a) changing programs or policies, or introducing new programs or policies, that are administered by or through the executive government;
>
> (b) introducing legislation in the Legislative Assembly during its first session after the results of such a referendum are known.

Constitutional Amendment Approval Act[47]

> 1. The government shall not introduce a motion for a resolution of the Legislative Assembly authorizing an amendment to the Constitution of Canada unless a referendum has first been conducted under the *Referendum Act* with respect to the subject matter of that resolution.

It should also be noted that the preamble of the *Constitutional Amendment Approval Act* of British Columbia indicates that this legislation is based on the belief that "it is *essential* that the Constitution of Canada reflect the values of British Columbians and that British Columbians have an opportunity to indicate their views on any proposed constitutional amendment."[48]

The contrast between these provincial statutes and the federal *Referendum Act* is obvious and striking. Unlike the federal Act, the provincial statutes not only empower but *require* the government to submit constitutional amendment proposals affecting the province directly to the people. This requirement (along with the preamble of the British Columbia *Constitutional Amendment Approval Act*) indicates a recognition of the special status of the constitution and the attendant importance of directly involving the people in the process of constitutional reform. Further, unlike the federal *Referendum Act*, the provincial statutes ensure that significant results of direct votes on constitutional matters are legally binding on the provincial governments in question. Thus, from a legal perspective, constitutional changes affecting these provinces cannot be achieved without the support of the people. Unlike the federal statute, these provincial Acts give real legal power over constitutional matters to the people and do not rely solely on political pressures to ensure the solicitation and enforcement of the people's views.

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[47] S.B.C., 1991, c.2.

[48] Emphasis added.

As a final point regarding the federal government's current statutory obligations to conduct a direct vote on constitutional amendments, it should be noted that the federal government's legal duty (or lack thereof) to hold a constitutional referendum is not affected by the existence of the provincial legislation discussed above. That is, the fact that the provincial governments of British Columbia and Alberta are currently legally bound to conduct provincial votes on constitutional amendments affecting these provinces does not impose any legal obligation on the federal government to ensure that a similar vote is held in the rest of the country or in any other part of the country. Still, as long as these provincial statutes remain in place, the people of these two provinces will be voting on every constitutional amendment proposal which requires the approval of their provincial legislatures. Where amendment proposals affect other provinces as well, there is likely to be significant public pressure for direct votes to be held in those provinces too.[49] The prospect of several provinces conducting direct votes of their own on a constitutional question is in turn likely to put pressure on the federal government to conduct a national referendum. Ultimately, then, the legal obligations of the governments of British Columbia and Alberta to hold provincial direct votes on proposed constitutional amendments may politically (but not legally) require the federal government to conduct a national direct vote on such amendments and to declare itself bound by the results of the vote.

3. Obligations Under Constitutional Law

At present, there are no provisions in Canada's written constitution which legally obligate the federal government to conduct a direct vote on constitutional amendment proposals. Quite to the contrary, the various amending formulas set out in the *Constitution Act, 1982* contemplate and require only the involvement of the federal Parliament and the provincial legislatures to pass constitutional amendments.[50] Further, as recently confirmed by the Supreme Court of Canada in *Haig* v. *Canada*[51], the provisions of the *Canadian Charter of Rights and Freedoms*[52] do not require the federal government to conduct a direct vote on any topic. Specifically, the Supreme Court of Canada noted that the right to freedom of expression set out in Section 2 of the *Charter* does not obligate the federal government to provide people with a particular forum for expression (i.e. a direct vote) and that the right to vote identified in Section 3 of the *Charter* is expressly limited to the right to vote for elected representatives and does not create or protect a right to vote in referendums or plebiscites.[53] Accordingly, while the *Charter* provisions may effect how direct votes are conducted[54], they do not impose any legal obligation on the federal government to hold direct votes.

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[49] Note as indicated in Chapter III, Section III.A that every province except Ontario, Nova Scotia and Manitoba currently has general enabling legislation in place permitting the provincial governments to conduct province-wide direct votes on matters of the provincial government's choosing.

[50] *Supra* n. 36.

[51] (1992) 156 N.R. 81.

[52] As enacted in *Canada Act 1982* (U.K.), c. 11.

4. Conclusion

In summary then, while most commentators suggest that there is a great public expection that Canadians will be directly consulted regarding future constitutional amendment proposals, aside from the political pressure which may arise from this expectation, there are no existing constitutional or legal requirements for the federal government to conduct a national direct vote on future constitutional amendments. Technically, the federal government is not currently obliged by convention, by statute or by the written constitution itself to consult the public on constitutional matters. Nevertheless, with the precedent of the 1992 referendum still so fresh in the national consciousness, for political reasons the federal government may have difficulty not holding a national direct vote on any constitutional amendment proposals which arise in the near future. If a further precedent supporting direct votes on constitutional matters is not established in the near future, however, there is a danger that the political pressure which apparently now exists to force the government to conduct a direct vote on constitutional amendment proposals may falter or fade and that the advancements toward national direct democracy achieved by the referendum on the Charlottetown Accord may be lost. At this point, then, the future of national direct votes on constitutional matters in Canada appears to be dependent upon the political pressure which the Canadian public can assert in favour of such votes. From the government's perspective, in light of these political pressures and in order to avoid having the use of national direct votes established on an *ad hoc* basis (possibly resulting in a constitutional convention), it may be prudent to concede early on that national direct votes should be held on constitutional matters. The government should then enact legislation (or pass a constitutional amendment) which recognizes and sets out clear parameters for the government's obligations to hold such votes.

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[53] For a more detailed discussion of this case, See Chapter III, Section IV.B.ii.

[54] See Section II.B. of this Chapter.

B. Ordinary Legislation

As the preceding discussion suggests, the 1992 referendum on the Charlottetown Accord has resulted in considerable public attention being paid to the federal government's obligation to hold a national direct vote on future constitutional amendment proposals. In the absence of a recent national referendum on a non-constitutional matter, however, relatively little discussion has occurred regarding the government's obligation to hold future national direct votes on ordinary legislative issues. On one hand, this lack of attention to non-constitutional referendums seems appropriate since, at present, there are no constitutional or legislative provisions in place requiring or even enabling the federal government to conduct a national vote on a non-constitutional matter. When it comes to ordinary legislative issues, the Canadian government currently remains in the same position that it was in before the prohibition and conscription votes: that is, the government is not legally obligated to conduct a referendum on any legislative issue and, if it chose to do so, it would first have to enact legislation authorizing or enabling such a vote to take place. On the other hand, however, it is at least partially the lack of public attention paid to date to non-constitutional referendums which has permitted the federal government to avoid being politically bound to hold such direct votes and to avoid enacting general enabling legislation.[55]

Notwithstanding the general lack of public attention given to non-constitutional national direct votes, there are currently some indications that this issue may soon play a more salient role in Canada's political agenda. Witness, for example, the present rise of the Reform Party of Canada and its party principles, including the advocacy of direct voting measures. If enough public interest in and support for national direct votes can be generated, the government may be forced to seriously consider enacting general enabling legislation authorizing non-constitutional direct votes to take place.

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[55] It was suggested during the debates on free trade that a direct vote should be held on this issue, but there was no great public outcry when such a vote did not materialize.

Obviously, the greatest advancement and protection of non-constitutional national direct votes would occur if the ability of Canadians to participate in such votes was set out in the constitution. Given this country's relative lack of experience with such votes and our difficulties in effecting constitutional change, however, such a constitutional amendment is highly unlikely in the near future. Accordingly, for the foreseeable future, any legal authorization for and protection of Canadians' ability to vote directly on legislative matters is most likely to be set out in an ordinary Act of Parliament. This, of course, means that the government's obligations and ability to conduct a national direct vote and the people's ability to participate in same will remain subject to change by the government of the day. Still, if general enabling legislation is passed, at least the question of whether to conduct a national direct vote on a given issue would not have to be confused with the merits of the issue itself. Further, such legislation would hopefully be drafted in a manner which would make the government obligated to conduct national direct votes in certain instances, either by requiring direct votes to be held on specific matters of national concern or by enabling the people to initiate direct votes by petition.

II. WHAT LEGAL OR CONSTITUTIONAL ISSUES MAY ARISE REGARDING THE ENABLING PROVISIONS OF LEGISLATION AUTHORIZING FUTURE NATIONAL DIRECT VOTES TO TAKE PLACE?

If enabling provisions for national direct votes were included in the Canadian constitution, these provisions would obviously form part of the supreme law of the country and would be above reproach from other provisions of the constitution or from ordinary legislation. As already suggested,[56] however, it is unlikely that national direct votes will be recognized in the constitution in the near future. Accordingly, for the foreseeable future, the legal authorization for national direct votes (if any) will probably continue to appear in ordinary federal legislation. Like all other federal statutes, any legislation enabling national referendums or plebiscites to take place must be constitutionally valid. Specifically, such legislation must be consistent with the constitutional division of powers and with the *Charter* of Rights and Freedoms.[57] With these requirements for consistency in mind, the following section will consider the constitutional challenges which may arise with respect to the enabling provisions of the current *Referendum Act* and with respect to possible expanded enabling provisions which may appear in future direct voting legislation.

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[56] See Section I.B. of this Chapter. Note, however, that a possible exception may be with regard to direct votes on consitutional amendment proposals themselves. Given the expectations apparently created by the 1992 referendum on the Charlottetown Accord, it is not too far fetched to think that the Canadian constitution may be amended to require national referendums to be held on constitutional amendment proposals.

[57] Such legislation also must comply with the terms of other more fundamental federal legislation, such as the *Canadian Bill of Rights*, S.C. 1960, c.44. The effect of the *Bill of Rights* on current and future national direct voting legislation is not specifically dealt with in this paper because, from a practical perspective, the protections offered by the *Bill of Rights* have been largely superceded by the protections offered by the *Charter*. Additionally, the *Bill of Rights* has only once been successfully relied upon as a basis for challenging the validity of other federal legislation. It therefore seems unlikely that the *Bill of Rights* could be successfully relied upon as a means of striking down national direct voting legislation now or in the future.

A. Constitutional Division of Powers

Given the current terms of Canada's *Referendum Act*,[58] it is unlikely that any future direct votes held under this legislation could be successfully challenged as constituting a violation of the country's constitutional division of powers.[59] The *Referendum Act* is quite conservative in its approach to direct voting, restricting direct votes to questions relating to the Canadian constitution (clearly a matter within federal jurisdiction), leaving the option of holding direct votes entirely in the hands of the federal government, and failing to make the results of direct votes binding on the government. Because the Act does not derogate from or add to the powers of the federal or provincial governments, then, there does not appear to be any valid legal basis upon which a direct vote held pursuant to this statute could be found to violate the constitutional division of powers.[60] The constitutional validity of national direct votes may become more difficult to ensure in the future, however, if Canada's enabling legislation is expanded to permit such votes to be held on non-constitutional questions or to give the public more control over the instigation and effect of direct votes.

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[58] *Supra* n. 31.

[59] Once again, this observation is made only with reference to the enabling provisions in the statute. No comment is made with respect to the provisions relating to the manner in which direct votes are to be carried out.

[60] Of course, some unlikely scenarios where challenges may occur can be envisioned. For example, if the federal government held a national direct vote to ascertain public opinion on a constitutional amendment affecting only one province, the government of the province in question may argue that the federal government's nation-wide survey is inappropriate because the relevant constitutional amending formula requires only the approval of the federal government and the province in question. However, since the federal government is not legally bound by the *Referendum Act* to follow the results of the vote, it does not appear that the federal government can be found to have violated the division of powers in conducting this extensive vote.

Given Canada's limited experience with national direct votes, there is currently very little case law providing guidance as to the constitutional limits of such votes. Nevertheless, along with certain elementary principles of constitutional law, the few cases which have dealt with direct votes at a provincial level do suggest some basic parameters for ensuring that national direct votes and their enabling legislation do not violate the constitutional division of powers. First, as a general principle of constitutional law, it is clear that national direct votes cannot infringe on subject areas within the exclusive jurisdiction of the provincial governments. Second, given the decision of the Judicial Committee of the Privy Council in *Re the Initiative and Referendum Act*,[61] it appears that national direct votes cannot validly bind the government to the results of a direct vote in a manner which would replace the parliamentary process or the role of the Governor-General in approving legislation. Finally, based on the finding of the Supreme Court of Canada in *Greater Hull School Board* v. *Attorney General of Quebec*,[62] a national direct voting scheme apparently cannot violate or conflict with the constitutional recognition and protection of provincial and minority rights.

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[61] (1919) 48 D.L.R. 18. For a detailed discussion of this case, see Chapter III, Section IV.A.i. Note that while it is questionable whether this case would be followed or decided in the same manner today, for the time being it is still a binding precedent and should therefore guide any attempts to expand the federal legislation enabling direct votes to be held.

[62] (1984) 56 N.R. 99. For a more detailed discussion of this case, see Chapter III, Section IV.A.ii.

Given the above parameters, it appears that considerable scope currently exists for expanding the use of national direct votes in Canada while maintaining the constitutional validity of the enabling legislation. Still, revisions to Canada's enabling legislation must be undertaken cautiously and drafted carefully to ensure that the above principles are complied with. In this regard, the following observations and recommendations are offered:

1. Subject Matter of National Direct Votes

Although the *Referendum Act* currently limits national direct votes to matters relating to the Canadian constitution, there is no legal or constitutional basis for this restriction. Accordingly, there are no legal or constitutional impediments to expanding the enabling legislation to permit national referendums or plebiscites to be held on non-constitutional matters. In order to comply with the constitutional division of powers, however, any federal statute enabling direct votes to be held should specifically restrict direct voting topics to those matters "within the jurisdiction of the Parliament."[63] Such a provision would ensure that the enabling legislation itself is not subject to a constitutional challenge for purporting to hold direct votes on matters outside the jurisdiction of the federal government. If a vote was then called pursuant to this legislation on a matter which arguably fell outside of federal jurisdiction, the constitutionality of the vote could be challenged in the courts without affecting the constitutional validity of the enabling legislation.

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[63] As proposed in Boyer's draft legislation. See Chapter III, Section II.B.

2. The Decision to Hold a National Direct Vote

Once again, while the *Referendum Act* currently enables direct votes to be held only at the instigation of the federal government, there is no obvious legal or constitutional impediment to enabling national direct votes to be initiated by the people, either with respect to issues or legislation already being dealt with by the government or with respect to issues or legislative proposals raised by the people themselves. Following the example set by some Canadian provinces and other western democracies, in order to permit the people to initiate direct votes, the enabling legislation would simply need to provide that, upon the petition of a certain percentage of the electorate, the federal government is required to conduct a national direct vote on a specified topic.[64] In order to ensure that the constitutional division of powers is complied with, however, such a provision should also specifically limit the people's initiative power to matters falling within the jurisdiction of the federal government.

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[64] Given the regional and provincial divisions in Canada, in order to avoid controversy, the enabling provisions should probably require the petition to be supported by a certain number of electors in each region or province.

3. Binding National Direct Votes

In considering the potential expansion of Canada's direct voting legislation, the most difficult issue of constitutional compliance arises with respect to the possibility of making direct votes binding on the federal government. Obviously, making direct votes binding on the government (especially in concert with an initiative power) would greatly increase the ability of the people to effect or prevent constitutional or legislative change. Primarily as a result of the Privy Council's decision in *Re Initiative and Referendum Act*, however, considerable controversy continues to exist over the constitutionality of binding referendums.

As previously indicated,[65] in *Re Initiative and Referendum Act*, the Privy Council dealt with the constitutionality of a Manitoba statute which required proposed legislation to be proclaimed as law by the Lieutenant-Governor if the legislation was approved by a majority of the electorate in a direct vote. The Court ultimately found this statute to be unconstitutional because it altered the powers of the Lieutenant-Governor by removing his discretion to assent to or reject a Bill passed by the provincial legislature. Although the Privy Council's decision has been critized for failing to recognize that the provision of royal assent to legislation is now (and was at the time of the decision) a mere formality, the case still apparently stands for the principle that direct votes cannot by-pass the processes of Parliament or usurp the powers of the constitutional heads of state. This principle has led some commentators to conclude that binding referendums are simply "not possible under the present Canadian constitution" because any popular vote having direct legislative authority would by definition trespass upon the powers of the Governor-General.[66] On the other hand, however, other analysts have suggested that this principle should not be followed in light of the formal role played by the Canadian Lieutenant-Governors and the Governor-General in approving legislation.[67] Still other observers have suggested that the principle set out in this case is no longer valid because of the Privy Council's subsequent decision in *R.* v. *Nat Bell Liquors Limited*[68] where the Court held that legislation enacted pursuant to a binding direct vote was valid because it was enacted in accordance with normal legislative procedures.

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[65] See Chapter III, Section IV.A.i.

Notwithstanding the apparent controversy regarding the current relevance and applicability of the *Re Initiative and Referendum Act* case, it would not be prudent to entirely ignore the principle of this case in attempting to enact constitutionally valid legislation providing for a binding national referendum. Instead, in drafting such legislation, an attempt should be made to comply with this principle by carefully describing the type of binding effect which a direct vote is to have on the enactment or repeal of legislation. In this regard, an example might be taken from some of the current provincial acts authorizing binding direct votes. Generally, these statutes indicate that, upon a given answer being provided by a majority of voters in a referendum, the provincial government is bound, as soon as practicable, to take any steps within its power that it considers necessary or advisable to implement the referendum results.[69] This approach apparently avoids the problems encountered in *Re Initiative and Referendum Act* because it does not permit the direct vote to replace the traditional legislative processes. Instead, this approach simply requires the government to do everything possible within its power and within the traditional legislative processes to implement the expressed will of the people.[70] From a practical standpoint, this requirement obligates the government to enact legislation reflecting the results of the direct vote. From a legal standpoint, however, this requirement does not appear to violate the constitutional division of powers.[71]

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[66] M. Dunsmuir, *Referendums: The Canadian Experience in an International Context*, (Library of Parliament, 1992) at 28.

[67] See for example, Boyer, *supra* n. 43, at 90.

[68] [1922] 2 A.C. 128. For a more detailed discussion of this case, see Chapter III, Section IV.A.i., n.95. As indicated in Chapter III, the argument exists that the *Nat. Bell Liquors* case didn't really change the law set out in *Re Initiative and Referendum Act* but just evaded the principle set out in the latter case because of the facts before the court in *Nat. Bell*.

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[69] See for example: *The Constitutional Referendum Act*, R.S.A. 1980, c. C-22.25, s.4; *The Referendum Act*, S.B.C. 1990, c.68, s.4; and *The Referendum and Plebiscite Act*, S.S. 1990-91, c. R-8.01, s.5.

[70] Obviously, if the people do not believe that the government is fulfilling these obligations, there is recourse through the courts.

[71] Of course, all of the potential constitutional difficulties in expanding Canada's direct voting legislation could be avoided if direct voting provisions were entrenched in the Constitution. If Canada's use of direct votes was expanded in this way, such votes could be validly held on any topic, at the instigation of the government or the people, and be legislatively self-enacting and still be, by definition, constitutional.

B. The *Canadian Charter of Rights and Freedoms*[72]

As long as national direct votes continue to be authorized by statute alone (as opposed to being constitutionally entrenched), these votes will be subject to scrutiny under the *Canadian Charter of Rights and Freedoms* with respect to both the substance of the voting rights conferred by the enabling legislation and the practical conduct of the votes. Although the Supreme Court of Canada has already indicated that the *Charter* does not *require* the government to conduct a national direct vote,[73] once the government has decided to conduct a national direct vote on a given topic, people who are excluded from voting (either by the terms of the enabling legislation itself or by other voting laws or regulations) may attempt to use the *Charter* as a basis for challenging the validity of the enabling legislation or the provisions of the legislation which prevent them from voting. Based on a review of the terms of the *Charter* of Rights, it appears that any such challenges are most likely to be made on the basis of Section 2(b), Section 3, Section 7 or Section 15 of the *Charter*. Accordingly, the following discussion will consider the potential implications of these *Charter* sections on the current *Referendum Act*[74] and possible future national direct voting legislation.

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[72] *Supra* n. 52.

[73] *Supra* n. 51.

[74] *Supra* n. 31.

1. Section 2(b): Freedom of Expression

According to Section 2(b) of the *Charter*:

> Everyone has the following fundamental freedoms:
>
> freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

Within certain limits, the freedom of expression guaranteed by this section has been found by the courts to include various forms of political expression, including campaigning for office, participating in public debates or protests, and voting in the election of legislative representatives.[75] To date, however, the courts have been very restrictive in determining what protection Section 2(b) of the *Charter* may provide for Canadians' ability to vote in national referendums or plebiscites.

Once again, the *Allman*[76] and *Haig*[77] decisions are the only cases in which Canadian courts have considered the relationship between direct voting and Section 2(b) of the *Charter*. As previously discussed[78], the courts in both of these cases stressed that, while Section 2(b) protects the right of Canadians to express their political views, this section does not provide Canadians with the right to express these views in a particular manner or forum. Accordingly, the courts concluded that Section 2(b) does not require the government to conduct direct votes. Further, if the government chooses to conduct such votes, Section 2(b) does not require the government to extend the ability to participate in these votes to anyone or to everyone. Thus, as long as it is authorized to do so by the enabling legislation, the federal government apparently can conduct a direct vote of all or any portion of the Canadian electorate without violating Section 2(b) of the *Charter*. Given the reasoning of the Supreme Court of Canada in the *Haig* decision, however, there remains some basis for arguing that an individual's section 2(b) rights have been violated if he is prevented from voting in a direct vote which he is entitled to participate in by the enabling legislation.[79]

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[75] For a detailed discussion of the Canadian courts' interpretations of this section, see P. Hogg, *Constitutional Law of Canada* (3rd ed. 1992).

[76] (1983) 50 A.R. 161 (N.W.T.C.A.). For a detailed discussion of this case, see Chapter III, Section IV.B.i.

[77] *Supra* n. 51.

[78] See Chapter III, Sections IV.B.i and ii.

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[79] It will be recalled that the Supreme Court of Canada's decision in the *Haig* case depended heavily on the Court's finding that, because Canada's *Referendum Act* enabled a referendum to be held across the country or in only a few provinces and because the referendum in Quebec was held pursuant to its own provincial enabling legislation, the federal government did not intend the 1992 referendum to be a national referendum. Accordingly, the Court concluded that, because the government did not intend to conduct a nation-wide referendum, the fact that Mr. Haig was excluded from voting did not violate his right to freedom of expression. This reasoning then leaves open the possibility for a future court to find that an individual's freedom of expression has been violated if he has been prohibited from voting in a direct vote which is clearly intended to obtain the views of the national electorate or at least to obtain the views of a specific groups of voters or which the individual in question is a part.

In any event, the Supreme Court's characterization of the 1992 referendum as a 'non-national' vote from the federal government's perspective is itself subject to criticism because it is based on a very technical and unrealistic view of the government's intention in carrying out the vote on the Charlottetown Accord. Hopefully, future courts will be more pragmatic when attempting to characterize the purpose and intent of future national direct votes.

Unless the Canadian constitution is amended to specifically provide for direct votes, it is unlikely that the courts will soon sway from their current reluctance to employ Section 2(b) of the *Charter* as a means of protecting an individual's ability to participate in a direct vote. The court's position in this regard has significant implications for the possible expansion of the future employment of national direct votes. On one hand, the court's present position may inhibit the expansion of direct votes in the future since it suggests that Section 2(b) of the *Charter* cannot be successfully relied upon to ensure that Canadians have an inherent right to initiate direct votes or to have their opinions, as expressed in direct votes, binding upon the government. On the other hand, however, the present view of the courts may contribute to the advancement of direct voting because it suggests that, if Canada's enabling legislation is expanded to provide for initiatives or binding referendums, these legislative provisions will not violate Section 2(b) of the *Charter* because these provisions would only further delineate the statutory authority surrounding direct votes.

2. Section 3: The Right to Vote

Section 3 of the *Charter* provides that:

> Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Although this provision is generally referred to as the "Right to Vote" section, because this section only deals specifically with the right to vote for elected representatives, it is unlikely to provide a valid basis for challenging the enabling legislation of a national referendum or plebiscite. In fact, as previously noted,[80] in the *Haig*[81] and *Allman*[82] cases, the Canadian courts have confirmed their unwillingness to expand the protection offered by section 3 of the *Charter* to include the right to vote in a referendum or plebiscite.

3. Section 7: Life, Liberty and Security of the Person

Section 7 of the *Charter* provides that:

> Everyone has the right to life, liberty and security of the person and the

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[80] See Chapter III, Section IV.B.i and ii.

[81] Supra n. 51.

[82] (1983) 44 A.R. 170 (S.C.N.W.T.), Aff'd on other grounds by the N.W.T. Court of Appeal, *supra* n. 76. Although section 3 of the Charter was not argued by counsel in the *Allman* case, the Supreme Court of the Northwest Territories nevertheless took note of this section in rendering its decision. Specifically, the Court observed that Section 3 "sets out expressly and quite precisely the nature of the voting rights which are given specific protection under the *Charter*" and that "there is nothing in s. 3 respecting any right to vote in a plebiscite." (p. 178). The Court also indicated that the remaining 'Democratic Rights' set out in the Charter "contain no language which permits any implication" of a right to a direct vote.(p. 178). Based on these observations, then, the Court concluded that section 3 of the Charter only protects an individual's right to vote in a federal or provincial election and not to vote on a plebiscite or referendum question. See Chapter III, Section IV.B.i. for a detailed discussion of this case and, in particular, of the Court of Appeal decision.

> right not to be deprived thereof except in accordance with the principles of fundamental justice.

To date, this provision has not been relied upon to challenge the voting restrictions of any Canadian direct voting statute or to support an individual's right to participate in a national direct vote. It is possible, however, that Section 7 may be used to support such arguments in the future. In this regard, the case most likely to be presented is that an individual who is prevented by enabling legislation from participating in a direct vote is being denied his right to "liberty" as guaranteed by Section 7 of the *Charter*. The essence of this argument is that the ability to vote in a referendum or plebiscite constitutes a political freedom which should be protected by Section 7.

Based on the judicial interpretation of Section 7 to date, it is unlikely that the courts would accept the above argument as a valid challenge to the enabling provisions of national direct voting legislation. Generally, the courts have been careful to note that the rights conferred by Section 7 are listed in the *Charter* as "Legal Rights" and that Section 7 therefore is most appropriately suited to the involvement of the courts as guardians of the justice system. "Liberty" as used in Section 7 has been most readily defined by the Courts as referring to physical liberty and has not typically been accepted by the Courts as including "political" liberty.[83] This conservative approach toward the interpretation of Section 7 along with the courts' demonstrated view that the ability to participate in a direct vote is solely a statutory right suggests that a future Section 7 challenge to direct voting legislation is most likely to fail.

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[83] While a detailed discussion of the Canadian courts' approach to the use of Section 7 is well beyond the scope of this paper, see the obiter dictum comments of J. Lamer in *Reference re Ss. 193 and 195.1 of the Criminal Code* [1990] 1 S.C.R. 1123 at 1171-1179 for a general explanation of the Supreme Court's approach toward the interpretation of

4. Section 15: Equality Rights

According to Section 15 of the *Charter*:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

As previously indicated,[84] this section was relied upon in *Haig*[85] to argue that an individual who had been prevented from voting in the 1992 referendum because he failed to meet the statutory residency requirements for the vote had been discriminated against in a manner prohibited by section 15. Ultimately, the court rejected this argument and concluded that the people who were prevented from participating in the vote because of

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Section 7.

[84] See Chapter III, Section IV.B.ii.

[85] *Supra* n. 51.

the residency requirements were not discriminated against in a manner analogous to persons suffering discrimination on the basis of race, religion or gender. The court also concluded that section 15 was not violated by the government's decision to conduct a referendum in some, but not all, provinces. In the opinion of the court, the restriction of a direct vote to certain geographical regions within the country is a legitimate political decision, possibly resulting in a differentiation of treatment among Canadians, but not resulting in the type of discrimination contemplated by Section 15.

Overall, the decision of the Supreme Court in *Haig* appears to be consistent with the Canadian courts' general approach to the application of Section 15 to date. Specifically, while this ruling ensures that Section 15 is not used to tie the hands of the government in making some pragmatic decisions regarding political participation, it also recognizes that restrictions to political participation based on personal or group characteristics (such as race, sex or any of the other elements listed in Section 15) will not be tolerated. Given the consistency of this approach with past court decisions, it is unlikely that future courts will drastically alter their view of the interaction between Section 15 and direct voting legislation if this issue arises again. Accordingly, it appears that Section 15 will be of little use in the future as a means of challenging enabling legislation which permits the government to call direct votes in certain regions of the country or to impose reasonable residency requirements upon participating voters. On the other hand, however, Section 15 still appears to offer significant protection against future direct voting legislation which would enable the government to restrict voter participation on the basis of otherwise irrelevant personal characteristics.

5. Conclusion

In summary, given the approach taken by Canadian courts to date with respect to the above noted provisions of the *Charter* and the interaction of these provisions with the current federal *Referendum Act*, it appears that the *Charter* will likely offer only very limited protection and support of national direct voting in the future. As previously indicated, the courts seem to have concluded that the *Charter* does not provide for or guarantee the right of Canadians to participate in direct votes. Accordingly, direct votes are purely creatures of statute and may therefore be validly provided for, restricted or prohibited by the government of the day. Where the government does choose to hold a direct vote, however, it appears that the government does have some obligation to ensure that the enabling legislation and the conduct of the vote are consistent with the rights which are protected by the *Charter*, such as the right to freedom of expression and the right to be free from arbitrary discrimination. Although the courts have been somewhat restrictive in applying these rights to direct voting legislation to date, there does appear to be some scope for the successful application of these rights to the future employment of direct votes. In particular, it appears that Section 2(b) of the *Charter* may offer protection for an individual's right to participate in a direct vote if he or she clearly falls within the group of people from whom the government is soliciting an opinion. Further, Section 15 of the *Charter* may be used to prevent the government from restricting voter participation based on personal characteristics.

III. WHAT LEGAL OR CONSTITUTIONAL ISSUES MAY ARISE REGARDING THE CONTENT OF LEGISLATION OR CONSTITUTIONAL AMENDMENTS ENACTED BY A DIRECT VOTE?

Barring drastic amendments to the Canadian constitution, if national direct votes are used in Canada in the future to enact ordinary federal legislation (as opposed to constitutional amendments), all such legislation will be subject to the same constitutional and legal requirements which are currently imposed on statutes enacted by Parliament. Specifically, all legislation enacted by national direct votes will have to deal only with matters within the competence of the federal government and will have to be consistent with the provisions of the *Charter of Rights* and the *Canadian Bill of Rights*. Accordingly, there currently appear to be significant protections built into the Canadian legal system to prevent direct votes from leading to the creation of oppressive or discriminatory legislation which critics of direct voting see as resulting from the 'tyranny of the majority.'

Obviously, the above restrictions on legislation resulting from direct votes may not apply if direct votes are used in Canada to change the constitution itself, and, in particular, to alter the terms of the *Charter* of Rights. In theory, if Canadians gain the ability to initiate or vote on constitutional amendments, the majority of Canadians may choose to remove or drastically amend some or all of the protections offered by the *Charter*. Of particular concern in this regard would be the *Charter* provisions that protect only a segment of society, such as some of the equality provisions or the provisions affecting the rights of native or French-speaking Canadians. In the absence of such *Charter* protections, direct votes could then arguably be used to enact legislation which would be very dangerous to minority groups.

While the scenario described above is certainly disconcerting, it does not provide a valid basis for rejecting the use of direct voting as a national lawmaking tool. Instead, by alerting us to the potential dangers of direct voting, this scenario suggests several observations and recommendations for the use of national direct votes in Canada:

(i) First, although direct votes arguably have the potential to play an important role in resolving Canadian constitutional matters,[86] the availability of such votes should not eradicate our historic recognition that constitutional change should, by nature, be a more difficult process than ordinary legislative change. Accordingly, if direct votes are used to amend the constitution, the enabling legislation or the constitutional provisions authorizing such direct votes to take place should ensure that more than a simple majority vote is required to pass the proposed amendment. For example, a successful amendment may require a majority of affirmative votes in each of the provinces or regions of the country.

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[86] See Chapter IV, Section IV.

(ii) The use of direct votes should not completely eradicate or eliminate the leadership role played by elected representatives. Undoubtedly, many elected representatives or professional politicians are more familiar with the issues concerning native rights or the political concerns of French-Canadians. Accordingly, these leaders can make a significant contribution in educating ordinary Canadians about constitutional issues before a national direct vote on these matters takes place.

(iii) As already noted, the experience of other countries suggests that direct votes generally have a conservative effect on constitutional change. Accordingly, given the current protections already afforded by the Canadian constitution to many minority groups, from a practical perspective it is unlikely that these protections would be significantly changed via a direct vote. Nevertheless, if these provisions are changed by a direct vote in spite of stringent amendment requirements and the educational efforts of community leaders, then one must question whether these provisions really reflect our national values and have a place in our constitution. After all, ultimately the constitution should be a document which accurately represents the Canadian national identity as perceived by Canadians.

CHAPTER SIX

CONCLUSION

What role can and should direct voting play as a national lawmaking tool in Canada?

In attempting to answer this question, I have examined the concept of national direct voting from a number of perspectives. First, in order to gain some insight into the ways in which direct votes can be used and the legislative purposes which can be served by same, I have examined the role played by national direct votes in other western democracies. Second, in order to understand how and why national direct votes have been used in Canada to date, the history of direct voting in this country was reviewed. Having thus overviewed the "facts" regarding the history of direct voting, I then discussed and analyzed the most common philosophical arguments favouring and opposing the use of direct votes as a legislative tool. Finally, I discussed the legal and constitutional issues likely to arise regarding the increased use of direct voting at the national level in Canada. Based upon my examination of direct voting in each of the areas noted above, the following observations and conclusions are offered with respect to the legislative role which national direct votes can and should play in Canada's future.

Generally, although most western democracies consider themselves to be "representative" democracies where laws are made primarily by elected representatives, the use of direct voting mechanisms as a legislative tool is not entirely foreign to any of these countries, including Canada. In fact, with the exception of the United States, national direct voting has been used at one time or another in most western democracies to resolve particularly significant or controversial legislative issues and many of these countries require national direct votes to be held on questions of constitutional reform. Moreover, although these countries have certainly experienced some problems in employing direct voting mechanisms, typically the experience of these nations with direct voting has been a positive one--permitting the general population to directly influence the content of legislation without resulting in any of the disasterous consequences often predicted by critics of direct voting. Still, while there may not be any obviously prohibitive problems associated with the use of direct voting mechanisms as a legislative tool, in order to achieve the most significant democratic benefit, direct votes require the participation of as many citizens as possible. Further, national direct votes place the greatest legislative power in the hands of the people where the people are able to initiate or petition for such votes to be held and where the government is bound by the results of the votes.

To date, Canada's experience with national direct voting has been extremely limited,[1] both with respect to the number of occasions on which direct votes have been held and with respect to the legislative role which such votes have played. National direct votes have been held in this country on only three occasions and, in each of these instances, the vote has resulted from a pragmatic, political decision to consult the electorate rather than from a philosophical commitment to obtain and follow the will of the Canadian people on fundamental national issues. None of the national direct votes held to date have been legally binding on the government. While there now appears to be a great deal of public pressure and political expectation on the federal government to hold national direct votes on constitutional matters, there is currently no legal or constitutional requirement on the government to hold such a vote on any topic or to be bound by the results of such a vote. Further, far from advancing the cause of national direct voting, to date the Canadian courts have refused to find any constitutional protections for direct voting and, on the contrary, have identified some constitutional limitations on the structure of legislation enabling direct votes to take place. Still, the court decisions to date suggest that, as long as national direct votes are properly provided for in the constitution or in enabling legislation, there are presently no constitutional or legal prohibitions against the use of national direct votes in Canada.

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[1] Note, however, that direct votes have had significant use at the local and provincial orders of government.

Given the limited use of national direct votes in Canada to date, there certainly is significant scope for increasing the national lawmaking role for such votes in this country in the future. Further, in light of the potential democratic benefits associated with the use of direct votes and the lack of any prohibitive problems arising from the use of such votes, it seems that increasing the use of direct votes at least on matters of fundamental national importance is a desirable and feasible method of advancing the democratic nature of Canada's national lawmaking system. Hopefully, if provided with the legally enforceable right to vote on some basic national issues, Canadians will feel less frustrated and alienated by their elected representatives and will feel more involved in the national decision-making process.

In order to effectively advance the cause of national direct voting in Canada, the first step which needs to be taken is to curb the federal government's ability to pragmatically decide when national direct votes will be held. In other words, the Canadian people should be provided with some sort of legally enforceable expectation that national direct votes will be held at least with respect to certain fundamental matters and that the results of these votes will be binding on the government. Obviously, the greatest guarantee of the people's ability to participate in direct votes on certain issues would be provided by including such a requirement in the Canadian constitution. Short of such a constitutional amendment, however, an ordinary federal statute could be enacted requiring the government to hold a national direct vote on certain issues and binding the government to the results of the vote. Although such a statute would be subject to amendment or repeal and therefore might not be as effective in protecting the people's right to national direct votes as a constitutional provision would be, this type of statute would certainly provide more direct voting protection than does the current *Referendum Act*.[2] The topics on which Canadians should be entitled to expect national direct votes to be held should include at least those issues which are of fundamental importance to the nation, particularly matters of constitutional change.[3]

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[2] It will be recalled that the *Referendum Act*, S.C. 1992, c. 30 currently only enables but does not require the federal government to call a national direct vote. The *Referendum Act* also only pertains to constitutional matters and does not make the results of a direct vote binding on the government.

Of course, any new enabling legislation must be carefully drafted so as to be constitutionally valid (See Chapter V, Section II).

A second step in increasing the legislative role of national direct votes in this country would be to remove the decision to hold a direct vote from the exclusive control of the government by providing Canadians with the ability to petition for or to initiate direct votes. Once again, this power of petition should exist at least with respect to constitutional matters or other fundamental national issues. The results of direct votes initiated by the public should also be binding on the government.

Obviously, increasing the availability and use of national direct votes in the ways suggested above would necessarily involve a greater degree of trust in the judgment of the people than does our current representative legislative system. It should be understood, however, that the above reforms are not advocated as replacements for our representative government system, but instead are proposed as devices to complement the status quo. On issues which are put to a national direct vote, elected representatives can play a valuable role in educating the public and the people can obviously play a significant role in influencing the direction of government policy. Given the regional, ethnic and economic diversity of this country, one would expect our elected representatives to be relieved to share their decision making power over fundamental issues with the people.

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[3] Some other fundamental national issues might include sovereignty questions or international relations matters (such as membership in NATO or free trade questions).

Finally, although the above recommendations reflect an inherent trust in the judgment of the people, the writer recognizes that some limitations on the "power of the people" is necessary, especially in a country as diverse as Canada. If national direct votes are used to enact ordinary legislation, some control over the content of that legislation is currently provided by the Canadian constitution and the *Charter of Rights and Freedoms*. On matters of constitutional reform, however, especially changes involving the *Charter of Rights* or the protection of minorities, more than a simple national majority vote should be required before the federal government is bound to enact a constitutional amendment. Further, in order to prevent abuse of a popular initiative power, strict requirements should be put in place regarding the number of signatures needed from each province before a petition can successfully require a national direct vote to be held. In the writer's view, these types of limitations on national direct votes do not derogate from the trust placed in the people by direct voting mechanisms. Instead, such limitations recognize the diversity of our nation and help to ensure that the direct voting process will be taken seriously by both the general public and by our elected representatives.

At the outset of this thesis, I mentioned the impact which the referendum on the Charlottetown Accord had in bringing the idea of national direct votes (at least on constitutional matters) to the attention of the Canadian public. Today, it has been over two years since the defeat of the Accord and, while the idea of constitutional reform has arguably faded from the public agenda, the notion of conducting national direct votes on certain critical matters remains in the public eye. For example, as Quebec once again prepares to hold a provincial direct vote on the sovereignty issue, the possibility of holding a national direct vote on this matter has been raised. National direct votes also remain on the agenda of the Reform Party of Canada and have been suggested in relation to topics such as gun control and criminal code reform. Accordingly, it seems that at some point the federal government will have to recognize, accept and legally provide for the increased legislative role which national direct votes can and should play in this country.

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